No. 86 1789

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

JAMES AND GEORGE CHONGRIS,
Petitioners,

vs.

BOARD OF APPEALS OF THE TOWN OF ANDOVER; TOWN OF ANDOVER; ALBERT F. CULLEN, JR., Individually and as Chairman of the ANDOVER BOARD OF APPEALS; JANE E. GRISWOLD, Individually and as Clerk and Member of the ANDOVER BOARD OF APPEALS; WESLEY E. WHITNEY, Individually and as a Member of the ANDOVER BOARD OF APPEALS; RICHARD H. MOODY, Individually and as a Member of the ANDOVER BOARD OF APPEALS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

I. FRANCIS GREGORY, II
Attorney for Petitioners
One Bulfinch Place
Suite 100
P.O. Box 8186
Boston, Massachusetts 02114
(617) 523-0770

5586
Lits Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Massachusetts zoning statutes, G.L. c. 40A, §§ 11, 15 and 17, providing post-deprivation judicial review, declaratory and injunctive (but no compensatory) relief are constitutionally adequate remedies to satisfy the due process rights of a property owner whose protected property interest in his granted building permit is unlawfully revoked.

2. Whether a protected building permit holder was obligated to raise and litigate his constitutional claims in a limited statutory judicial review proceeding in state court, or could permissibly bifurcate and restrict his state action to state law issues and return to a reserved federal forum for the litigation of his unraised constitutional claims, upon the favorable completion of the affirmed state court action.

3. Whether civil rights plaintiffs prevailing in a restricted state court action may offensively employ and collaterally estop, under 28 U.S.C. § 1738, losing zoning board defendants from challenging the state court determinations, as affirmed on appeal, that the Andover Zoning Board members acted unlawfully and without jurisdiction in revoking plaintiffs' permit to build a Dunkin' Donuts Shop on their properly zoned property upon the petition of the non-aggrieved, Friends of Shawsheen Village Association, thus forfeiting their federal, qualified immunity.

Page

TABLE OF CONTENTS

Questions Presented for Review..... i

Table of Contents..... ii

Table of Citations..... iii

Opinions Below..... 2

Jurisdiction..... 2

Constitutional Provisions and Statutes Involved..... 3

Statement of Case..... 5

Reasons for Granting the Writ..... 9

I. The decision below permits state law to immunize a public, policy-making board and to deny a compensatory remedy for the non-negligent, unlawful and deliberate revocation of a protected permit and right to build..... 9

II. The decisions below disregarded and implicitly denied Petitioners' request to offensively employ collateral estoppel based upon

Contents

Page

affirmed state court rulings in a subsequently decided civil rights challenge filed and reserved for federal court determination prior to any adjudication of the state court action restricted to state law issues..... 20

Conclusion..... 25

TABLE OF CITATIONS

Cases Cited:

Aetna Casualty & Surety Co. v. Niziolek, 395 Mass. 737, 481 N.E.2d 1356 (1985)..... 25

Agins v. City of Tiburon, 447 U.S. 255 (1980)..... 9

Allen v. McCurry, 449 U.S. 90 (1980).... 21, 23

American Trial Lawyers v. N.J. Supreme Court, 409 U.S. 467 (1973)..... 22

Contents

Page

Amherst Growth Study Committee, Inc. v. Board of Appeals of Amherst, 1 Mass. App. Ct. 826, 296 N.E.2d 717 (1973)..... 19

Arnett v. Kennedy, 416 U.S. 134 (1974)..... 13

Baker v. McCollan, 443 U.S. 137 (1979)..... 13

B.C.R. Transport Co. Inc. v. Fontaine, 727 F.2d 7 (1st Cir. 1984)..... 24

Beckett v. Building Inspector of Marblehead, 6 Mass. App. Ct. 96, 373 N.E.2d 1195 (1978)..... 19

Bergeron v. Estate of Loeb, 777 F.2d 792 (1st Cir. 1985)..... 22

Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971)..... 25

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 19

Bouchard v. Ramos, 348 Mass. 292, 203 N.E.2d 678 (1965)..... 12

Bradley v. Fisher, 13 Wall 335 (1872)..... 19

Brown v. Corey, 134 Mass. 249 (1883)..... 12

Contents

Page

Burnett v. Grattan, 468 U.S. 42 (1984).... 6, 16

Butz v. Economou, 438 U.S. 478 (1978)..... 19

Carey v. Piphus, 435 U.S. 247 (1978)..... 18

Catrone v. Massachusetts State Racing Commission, 535 F.2d 669 (1st Cir. 1976)..... 22

Chartrand v. Riley, 354 Mass. 242, 237 N.E.2d 10 (1968)..... 12

Chongris v. Board of Appeals, 17 Mass. App. 999, 459 N.E.2d 1245 (Mass. App. Ct. 1984)..... 2, 7

Chongris v. Board of Appeals, 614 F. Supp. (D. Ma. 1985)..... 2, 8, 21

Chongris v. Board of Appeals, 811 F.2d 36 (1st Cir. 1987)..... 2, 9, 21

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985)..... 17

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976)..... 18

City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1982)..... 18

Contents

Page

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985)..... 18

City of Renton v. Playtime Theaters Inc., 106 S. Ct. 925 (1986)..... 17

City of Springfield v. Kibbe, 107 S. Ct. 1114 (1987)..... 18

Commonwealth v. Lopez, 383 Mass. 497, 420 N.E.2d 319 (198)..... 24

Daniels v. Williams, 106 S. Ct. 662, (1986)... 10

Dennis v. Sparks, 449 U.S. 25 (1980)..... 19

Durfee v. Duke, 375 U.S. 106 (1963)..... 25

Ellis v. Board of Selectmen of Barnstable, 361 Mass. 794, 282 N.E.2d 637 (1972)..... 12

England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964)..... 21

Euclid v. Ambler Co., 272 U.S. 365 (1926)... 17

Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171, 366 N.E.2d 668 (1977)..... 15

Contents

Page

Fireside Motors Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 479 N.E.2d 1386 (1985)..... 24

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, No. 85-1199, prob. jur. noted, 106 S. Ct. 3292 (1986)..... 10

Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 407 N.E.2d 363 (1985)..... 15

Gildea v. Ellershaw, 363 Mass. 800, 298 N.E.2d 847 (1973)..... 11

Goldberg v. Curhan, 332 Mass. 310, 124 N.E.2d 926 (1955)..... 12

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 15

Green v. Lindsey, 456 U.S. 444 (1982)..... 14

Haring v. Prosise, 465 U.S. 306 (1983)..... 21

Harrison v. Textron, Inc., 367 Mass. 540, 378 N.E.2d 838 (1975)..... 12

Hoffman v. Pursue Ltd., 420 U.S. 592 (1975)..... 23

Hudson v. Palmer, 468 U.S. 517 (1984)... 11, 13

Contents

Page

Imbler v. Pachtman, 424 U.S. 409 (1976)..... 19

Ingraham v. Wright, 430 U.S. 651 (1977)..... 13

Konstantopoulos v. Whatley, 384 Mass. 123, 424 N.E.2d 210 (1981)..... 16

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982)..... 21

LaPointe v. License Board of Worcester, 389 Mass. 454, 451 N.E.2d 112 (1983)..... 16

Leonard v. School Committee of Springfield, 241 Mass. 325, 135 N.E.2d 459 (1922)..... 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 13

MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986)..... 9, 23

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985)..... 21

Martinez v. California, 444 U.S. 277 (1980)... 11

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)..... 14

Contents

Page

Memphis Community School District v. Stachura, 106 S. Ct. 2537 (1986)..... 18

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978)..... 13

Middlesex & Boston St. Railway Co. v. Board of Aldermen of Newton, 371 Mass. 849, 359 N.E.2d 1279 (1977)..... 11

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)..... 22

Migra v. Warren City School District, 465 U.S. 75 (1984)..... 21, 22

Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111, 436 N.E.2d 1236 (1982)..... 16

Mitchum v. Foster, 407 U.S. 225 (1972)..... 25

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)..... 18

Monroe v. Pape, 365 U.S. 167 (1961)..... 16

Montana v. United States, 440 U.S. 147 (1979)..... 24, 25

Contents

Page

Moore v. City of East Cleveland, 431 U.S. 494 (1977)..... 17

Mullane v. Central Hanover Bank & Trust Co., 334 U.S. 306 (1950)..... 14

Ott v. Board of Registration in Medicine, 276 Mass. 566, 177 N.E. 542 (1931)..... 15

Owen v. City of Independence, 445 U.S. 622 (1980)..... 18

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)..... 24

Parratt v. Taylor, 451 U.S. 527 (1981)... 10, 13

Parson Steel Inc. v. First Alabama Bank, 106 S. Ct. 768 (1986)..... 21

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982)..... 23

Paul v. Davis, 424 U.S. 693 (1976)..... 13

Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986)..... 18

Pennzoil Company v. Texaco, Inc., 55 L.W. 4457 (1987)..... 22

Pulliam v. Allen, 466 U.S. 522 (1984)..... 19

Contents

Page

Rafferty v. Sancta Maria Hospital, 5 Mass. App. Ct. 624, 367 N.E.2d 856 (1977)..... 19

Raskiewicz v. The Town of New Boston, 754 F.2d 38 (1st Cir. 1985)..... 17

Save the Bay, Inc. v. Dept. of Public Utilities, 366 Mass. 667, 322 N.E.2d 742 (1975)..... 19

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1980)..... 10, 23

Sherman v. Rent Control Board of Brookline, 367 Mass. 1, 323 N.E.2d 730 (1975)..... 11

Stump v. Sparkman, 435 U.S. 349 (1978)..... 19

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980)..... 19

Village of Belle Terre v. Borass, 416 U.S. 98 (1974)..... 17

Vitek v. Jones, 445 U.S. 480 (1980)..... 13

Wachusetts Regional School District Commission v. Erickson, 354 Mass. 768, 238 N.E.2d 369 (1968)..... 12

Contents

Page

Whitney v. Worcester, 373 Mass. 208, 366 N.E.2d 1210 (1977)..... 11

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)..... 10, 23

Wilson v. Garcia, 471 U.S. 261 (1985)..... 6, 16

Wolff v. McDonald, 418 U.S. 539 (1974)..... 15

Zahn v. Bd. of Public Works, 274 U.S. 325 (1927)..... 17

Statutes Cited:

M.G.L. c. 40A, sec. 11..... 4, 13

M.G.L. c. 40A, sec. 15..... 4, 13

M.G.L. c. 40A, sec. 17..... Passim

28 U.S.C. sec. 1738..... 3, 20, 21

28 U.S.C. sec. 1254(1)..... 2

28 U.S.C. sec. 2101(2)..... 2

42 U.S.C. sec. 1983..... 4, 10, 16, 18

Contents

Page

APPENDIX

Appendix A-James and George Chongris v. Board of Appeals of the Town of Andover, et al., 811 F.2d 36 (1st Cir. February 12, 1987)..... 1a

Appendix B-James and George Chongris v. Board of Appeals of the Town of Andover, et al., 614 F. Supp. 998 (D. Ma. July 30, 1985)..... 32a

Appendix C-District Court's Denial of Plaintiffs' Motion to Amend, and Judgment of Dismissal (July 23, 1986)..... 44a

Appendix D- George Chongris and another v. Board of Appeals of Andover, and others, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (Mass. App., February 15, 1984)..... 45a

Appendix E-April 25, 1984 Order of the Massachusetts Appeals Court awarding double costs and $1,000 fee..... 50a

Appendix F-Declaratory Judgment of the Essex (MA) Superior Court entered December 29, 1982..... 51a

Contents

Page

Appendix G-November 13, 1979 Decision of the Zoning Board of Appeals of the Town of Andover..... 52a

Appendix H-The Massachusetts Zoning Act, General Laws, Chapter 40A, Sections 11, 15 and 17..... 58a

Appendix I-Andover Zoning By-Law, Section IV, Use Regulations A & B..... 68a

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES AND GEORGE CHONGRIS,

Petitioners,

vs.

BOARD OF APPEALS OF THE TOWN OF ANDOVER; TOWN OF ANDOVER; ALBERT F. CULLEN, JR., Individually and as Chairman of the ANDOVER BOARD OF APPEALS; JANE E. GRISWOLD, Individually and as Clerk and Member of the ANDOVER BOARD OF APPEALS; WESLEY E. WHITNEY, Individually and as a Member of the ANDOVER BOARD OF APPEALS; RICHARD H. MOODY, Individually and as a Member of the ANDOVER BOARD OF APPEALS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The Petitioners, James and George Chongris, respectfully petition this Court that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 12, 1987. That opinion, reported at 811 F.2d 36 (1st Cir. 1987), appears as Appendix A. The First Circuit affirmed the July 23, 1986 judgment of dismissal of the District Court for the District of Massachusetts (Appendix C), whose opinion is reported at 614 F. Supp. 998 (D. Ma. 1985) (Appendix B).

In a February 15, 1984 rescript opinion reported at 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (1984) (Appendix D), the Massachusetts Appeals Court had earlier affirmed the December 29, 1982 declaratory judgment of the Essex (MA) Superior Court (Appendix F), annulling the November 13, 1979 decision of the Andover Zoning Board of Appeals (Appendix G).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on February 12, 1987. This petition for certiorari is filed within ninety (90) days, 28 U.S.C. § 2101(c), and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 1738 (State and Territorial statutes and judicial proceedings; full faith and credit) provides:

> The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 (Civil action for deprivation of rights) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The challenged Massachusetts zoning statutes, G.L. c. 40A, §§ 11, 15 and 17 appear in Appendix H, and the Andover Zoning By-Law appears in Appendix I.

STATEMENT OF CASE

On June 28, 1979, Petitioners James and George Chongris applied for a permit to build a Dunkin' Donuts Shop on their commercially-zoned property on Main Street in Andover, Massachusetts. The Andover Zoning By-Law (Appendix I) gave them the right to do so, so long as there was sufficient parking. On August 2, 1979 the Andover Building Inspector concurred, and confirmed that right upon his inspection and determination that adequate parking was indeed present, and issued a building permit.

The Petitioners were unable to exercise that property right because a non-aggrieved, unincorporated association decided to exercise a right of appeal the association did not have, and because the Andover Zoning Board of Appeals unlawfully allowed the petition of the non-aggrieved Friends of Shawsheen Village Association to serve as a vehicle to revoke and deprive the Petitioners of their right to build.

That deprivation of the right to build came after the Chairman of the Board questioned the Friends' entitlement to appeal; after the Board's published notice failed to comply with minimal statutory or constitutional standards; after a November 1, 1979 public hearing which permitted no cross-examination; and after a public inspection of Petitioners' premises at 8:00 A.M. on the morning of Saturday, November 10, 1979 for which neither James Chongris nor his attorney

were given advance or the agreed notification. Three days later the Andover Zoning Board revoked the building permit (Appendix G).

The Petitioners' timely (within twenty days) availed themselves of the state law judicial review remedy to annul the Zoning Board's action, under G.L. c. 40A, § 17, in the Massachusetts State Superior Court. That "exclusive" state law remedy of annulment does not provide for the recoupment of any compensatory damages or attorney fees, and permits only the recovery of "costs," and only if the Board acts with gross negligence, bad faith, or malice, G.L. c. 40A, § 17.

After Petitioners filed their state law action, and prior to any answer by the Zoning Defendants in that state law action or any adjudication of that dispute, the Petitioners initiated a federal action on October 14, 1980, for damages based upon the alleged violation of Petitioners' federal rights. Petitioners' commencement of this federal action was timely, that is, within the first of the three years allowed for tort, personal injury, and section 1983 actions, Wilson v. Garcia, 471 U.S. 261 (1985). No defendant raised any limitations defense. Nor was there any need to challenge the short, twenty day statutory period to seek judicial review provided by G.L. c. 40A, § 17, Cf. Burnett v. Grattan, 468 U.S. 42 (1984) (inappropriate to borrow six month period for administrative resolution into civil rights scheme).

In February 1981, Petitioners filed a "Federal Reservation of Federal Claims and Notice of Said Claims" to the State (Essex Superior) Court, and a Motion to Strike Defendants' Affirmative Defenses, pointing out the inapplicability of res judicata, the non-necessity for abstention, and Petitioners' willingness to first adjudicate their state court complaint, and then return to federal court for a decision on their federal claims. No defendant objected to this bifurcated approach, and the District Court took no action either.

On December 29, 1982, the Essex (MA) Superior Court annulled the decision of the Andover Zoning Board of Appeals and declared that Petitioners' building permit was validly issued (Appendix F). On the Board's appeal, the Massachusetts Appeals Court affirmed the Essex Superior Court judgment, holding that the Friends of the Shawsheen Village Association, a voluntary neighborhood association that appealed the Inspector's decision granting the building permit, were not aggrieved parties and therefore the Board had no jurisdiction to consider the non-aggrieved Friends' appeal or to revoke Petitioners' permit, Chongris v. Board of Appeals of Andover, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (Mass. App. Ct. 1984) (Appendix D).

The Petitioners moved for double costs and $7,055 in counsel fees because of the Board's frivolous appeal. On April 25, 1984, the Appeals

Court awarded double costs and $1,000 in fees (Appendix E).

Returning now to their reserved federal forum, the Petitioners challenged certain notice, hearing and remedial aspects of the Massachusetts zoning statutes in their allowed amended complaints. The Petitioners moved for partial summary judgment, asserting the compensatory inadequacy and procedural deficiencies of the state statutory scheme, G.L. c. 40A, 11, 15 and 17, and the unavailability of a good faith, federal, qualified immunity for the Town, Zoning Board, or its members. Petitioners argued that their reservation of the federal forum permitted, and did not preclude, the litigation of the amended, unlitigated federal claims, and asked the District Court to permit the offensive use of collateral estoppel based upon the favorable, fully litigated and frivolously appealed state court judgment involving the same Plaintiffs and same Zoning Board Defendants.

On July 30, 1985, the District Court issued its Memorandum and Order allowing Defendants' Motion to Dismiss on res judicata grounds, 614 F. Supp. 998 (D. Ma. 1985) (Appendix B).

The Plaintiffs moved to amend, alter and correct, and then appealed the judgment of dismissal (Appendix C).

On February 12, 1987, the First Circuit affirmed the dismissal, not on the District Court's

stated res judicata basis, but on the "independently sufficient ground that plaintiffs' complaint failed to state a cognizable federal claim upon which relief could be granted," Chongris v. Board of Appeals, 811 F.2d 36, 37, n. 1 (1st Cir. 1987) (Appendix A).

REASONS FOR GRANTING THE WRIT

I.

The decision below permits state law to immunize a public, policy-making board and to deny a compensatory remedy for the nonnegligent, unlawful and deliberate revocation of a protected permit and right to build.

This case presents the Court with the opportunity to definitively decide the due process question that has evaded review in the taxings context--whether a state can deprive a property owner of a compensatory remedy and limit to declaratory and injunctive relief the remedies available to a person whose constitutionally protected property interest is nonnegligently deprived, even for that interim, temporary period between the deprivation and the recission or invalidation of the deprivation. MacDonald, Sommer, & Frates v. Yolo County, 106 S. Ct. 2561, 2568 (1986) (White, J., dissenting, in part, at 2573); Agins v. City of Tiburon, 447 U.S. 255 (1980) (no need to consider limitation of remedies in developer's facial attack on city ordinance changing zoning without first having sought local

approval, at 263); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) (failure of final judgment precluded Court from addressing monetary remedy, but four dissenting Justices would have reached merits in favor of compensatory relief, observing that "(I)nvalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken," at 655); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (no final decision by local planning commission as to application of ordinance to proposed plan made compensatory constitutional claim unripe). See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, No. 85-1199, prob jur noted, 106 S. Ct. 3292 (1986).

In other words, does the Constitution, or 42 U.S.C. § 1983, create a "procedure for compensation," Parratt v. Taylor, 451 U.S. 527, at 548 (Powell, J., concurring in the result), for a nonnegligent deprivation of a property interest (here a granted building permit) by a local, policy-making zoning board which affirmatively abused its power, Daniels v. Williams, 106 S. Ct. 662, 665 (1986), citing Parratt v. Taylor, supra, at 548-549 (Powell, J., concurring in result), by accepting jurisdiction over an appeal by a non-aggrieved association for which the Board had no jurisdiction, and then deliberately revoking that permit after a public hearing which permitted no cross-examination, and after an 8:00 A.M.

Saturday morning view for which the Board failed to notify the permit holder or his attorney. Neither the Massachusetts zoning laws, G.L. c. 40A, § 17, nor Massachusetts common law[1] provides a compensatory remedy for such losses, cf. Hudson v. Palmer, 468 U.S. 517, 533-535 (1984). Nor can state statutory or common law immunities deprive Petitioners of a federal remedy, Martinez v. California, 444 U.S. 277, 283-284, n. 7 and 8 (1980) (permitting a "state immunity defense . . . would transmute a basic guarantee into an illusory promise"); see also Ferri v. Ackerman, 444 U.S. 193, 198, n. 13 (1979) (federal interest in defining immunity defense).

G.L. c. 40A, § 17 provides that "costs shall not be allowed against the Board . . . unless it shall appear to the Court that the Board . . . in making the decision appealed from acted with gross negligence, in bad faith or with malice."

---

1. Gildea v. Ellershaw, 363 Mass. 800, 820, 298 N.E.2d 847, 858-859 (1973) (common law immunity of public officials), and Sherman v. Rent Control Board of Brookline, 367 Mass. 1, 7, 323 N.E.2d 730 (1975) (reversing award of damages to landlord against nonliable municipality); Middlesex & Boston St. Railway Co. v. Board of Aldermen of Newton, 371 Mass. 849, 861, 359 N.E.2d 1279 (1977) (no basis for imposing liability on either board members personally or on city); see also, Whitney v. Worcester, 373 Mass. 208, 220-221, 366 N.E.2d 1210 (1977).

Costs, of course, are not compensatory damages, nor do they include counsel fees, Brown v. Corey, 134 Mass. 249, 251 (1883) (costs are taxable costs--excludes charges for counsel fees); Sears v. Nahant, 215 Mass. 234, 237, 102 N.E. 543 (19134) (counsel's fee not included in expenses); Leonard v. School Committee of Springfield, 241 Mass. 325, 332, 135 N.E. 459 (1922) (solicitor fees denied as taxable costs); Goldberg v. Curham, 332 Mass. 310, 311-312, 124 N.E.2d 926 (1955) (taxable costs . . . do not cover legal or other expenses); Chartrand v. Riley, 354 Mass. 242, 237 N.E.2d 10 (1968) (counsel fees not recoverable against individual public officer in individual capacity); Wachusetts Regional School District Commission v. Erickson, 354 Mass. 768, 238 N.E.2d 369 (1968) (no attorney fees in declaratory judgment action); Ellis v. Board of Selectmen of Barnstable, 361 Mass. 794, 282 N.E.2d 637 (1972) (error to award fees to successful plaintiffs in declaratory judgment action); Harrison v. Textron, Inc., 367 Mass. 540, 328 N.E.2d 838 (1975) (attorney fees properly excluded as damages in a nuisance complaint). And before the Court can even award statutory costs, the Court must make a finding that the Board "acted with gross negligence, in bad faith or with malice," Bouchard v. Ramos, 348 Mass. 292, 293, 203 N.E.2d 678 (1965). By not alleging gross negligence, bad faith or malice, and by not basing their constitutional claim on such allegations, or findings, such costs are not available under G.L. c. 40A, § 17.

Because neither the Massachusetts statutory zoning scheme, nor common law provide an adequate, compensatory remedy, the Petitioners were compelled to seek relief under 42 U.S.C. § 1983, Paul v. Davis, 424 U.S. 693 (1976); Ingraham v. Wright, 430 U.S. 651, 672 (1977); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978); Baker v. McCollan, 443 U.S. 137 (1979); Parratt v. Taylor, 451 U.S. 527, 543-544 (1981); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Hudson v. Palmer, 468 U.S. 517 (1984); Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 195 (1985).

Even aside from the compensatory inadequacy of the Massachusetts remedial statutory or common law schemes, the state statutory procedures for revoking granted permits are themselves constitutionally deficient, and Petitioners challenged the constitutionality of G.L. c. 40A, 11 and 15. The constitutionality or constitutional "adequacy of the statutory procedures for deprivation of statutorily created property interest must be analyzed in constitutional terms," Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982), quoting Vitek v. Jones, 445 U.S. 480, at 490-491, n. 6 (1980), quoting Arnett v. Kennedy, 416 U.S. 134, at 167 (1974) (opinion concurring in part).

The statutory notice, G.L. c. 40A, § 11 and hearing provisions, G.L. c. 40A, § 15, do not satisfy constitutional standards, in that the

§ 11 notice provision is not "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections," Mullane v. Central Hanover Bank & Trust Co., 334 U.S. 306, 314 (1950); Green v. Lindsey, 456 U.S. 444, 453 (1982); Mennonite Board of Missions v. Adams, 462 U.S. 791, 795 (1983).

Furthermore, G.L. c. 40A, § 15 specifies no rights that affected property owners (or permit holders) have at public hearings held by a zoning board of appeals on an appeal by an aggrieved party. Section 15 says that the "chairman . . . may administer oaths, summon witnesses and call for the production of papers." The statute clearly contemplates live testimony, but it does not say that the affected persons may question those summoned witnesses or produce papers not called for by the chairman. At the November 1, 1979 public hearing, the Board Chairman, not Petitioners or their attorney, did the questioning.

The question is whether some form of cross-examination and presentation of documentary evidence is required by the Constitution. The Petitioners argue that where they had a permit, and where the Building Inspector had made a determination of zoning compliance and adequate parking, and where adverse and hostile witnesses (i.e., the Friends and their supporters) testify and offer documents and their views on verifiable or ascertainable facts (i.e., the number of rooms,

parking spaces, seating capacity, etc.), in an effort to persuade the Board to review and reverse the Building Inspector, the affected property owner/permit holders' right to confront and cross-examine these witnesses is constitutionally necessary. Where there are no institutional impediments to such confrontation, Cf. Wolff v. McDonnell, 418 U.S. 539, 567 (1974), cross-examination reduces the risk of erroneous governmental decision-making based upon unchallenged, unquestioned testimony, and should be constitutionally recognized under circumstances affecting property rights, Goldberg v. Kelly, 397 U.S. 254 (1970) (pre-termination evidentiary opportunity to confront adverse witnesses and present arguments and evidence before an impartial decision-maker). See also Ott v. Board of Registration in Medicine, 276 Mass. 566, 574-575, 177 N.E. 542 (1931) ("reasonable cross-examination to test its [the testimony's] truthfulness and [the] credibility . . . was the right of the petitioner" (at 574)--a physician whose license to practice medicine had been wrongfully cancelled upon willfully false testimony); Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171, 182, 366 N.E.2d 668 (1977) (developer entitled to be "advised of all the facts and other material in the possession of the board on which it intends to rely, and he must be given the opportunity to produce all relevant evidence, to cross-examine witnesses, and to present argument," at 182); Foster from Gloucester Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 407 N.E.2d

363 (1980) (right of reasonable cross-examination is one element of a full and impartial license revocation hearing, at 291-292); Konstantopoulos v. Whatley, 384 Mass. 123, 135, n. 9, 424 N.E.2d 210 (1981) (entertainment licensee entitled to opportunity to call and cross examine opposing witness in a reasonable manner); LaPointe v. License Board of Worcester, 389 Mass. 454, 451 N.E.2d 112 (1983) (junk dealer subject to revocation hearing was "permitted to cross-examine witnesses, conduct direct examination of his own witnesses and argue the merits of his case to the board," at 459), but see Milton Commons Associates v. Board of Appeals of Milton, 14 Mass. App. Ct. 111, 114, 436 N.E.2d 1236 (1982) (zoning hearing involving twelve separate sessions, but not requiring cross-examination of adverse witnesses).

G.L. c. 40A, § 17 provides an adequate, and the exclusive, state remedy to annul the decision of a zoning board, but neither the Zoning Statute nor the Massachusetts common law provide any remedy to compensate a property owner whose protected permit is unlawfully revoked by a board. Petitioners' challenge to section 17 and invocation of 42 U.S.C. § 1983 was "supplementary to the state remedy, and the state remedy need not be first sought and refused before the federal one invoked," Monroe v. Pape, 365 U.S. 167, 183 (1961) and "independently enforceable whether or not it duplicates a parallel state remedy," Wilson v. Garcia, 471 U.S. 261, 279 (1985); Burnett v Grattan, 468 U.S 42 (1984)

("independent of other legal or administrative relief that may be available as a matter of federal or state law," at 50).

The Petitioners here did not ask the Federal District Court or First Circuit Court of Appeals, and do not ask this Court, to sit as a "super zoning board of zoning board of appeals," Raskiewicz v. The Town of New Boston, 754 F.2d 38, 44 (1st Cir. 1985), nor to decide their zoning dispute with the Zoning Board of Andover. Rather, Petitioners asked the courts to decide their constitutional claims to fair and compensatory procedures that happened to arise in the course of a zoning dispute, and the application of the zoning laws. As far back as Euclid v. Ambler Co., 272 U.S. 365 (1926) (affirming the validity of a zoning ordinance against a constitutional attack); and Zahn v. Bd. of Public Works, 274 U.S. 325 (1927) (no unconstitutional application of restrictive residential zoning); and as most recently as City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925 (1986) (adult theater zoning upheld), this Court has entertained constitutional challenges to zoning laws; see also City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) (invalidating a municipal zoning ordinance requiring a special use permit to group home for mentally retarded residents); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (ordinance restricting relatives living in home violates due process); Village of Belle Terre v. Borass, 416 U.S. 98 (1974) (valid ordinance limiting certain occupancy in one-family

dwellings); Cf. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (city ordinance providing for 55% referendum vote approval for any changes in land use did not violate land owner's due process rights, but see dissenting opinion of Justice Stevens, at 680-695, on the conformity of state zoning procedures to constitutional standards of due process). The Petitioners respectfully request this Court to entertain their challenge to the Massachusetts statutes affirmed in the Court below.

The Circuit Court's failure to recognize a federal cause of action for compensatory damages against a local policy-making board based upon state statutory immunity is contrary to the express dictates of 42 U.S.C. § 1983, contrary to this Court's damage authorizing decisions against non-immune governmental entities, Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986); Memphis Community School District v. Stachura, 106 S. Ct. 2537 (1986); Cf. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1982); see also Owen v. City of Independence, 445 U.S. 622, 657 (1980); Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978); Carey v. Piphus, 435 U.S. 247, (1978); see also City of Springfield v. Kibbe, 107 S. Ct. 1114 (1987), and provides little, if any, incentive for local constitutional, or statutory, compliance.

The fact that Petitioners argued that the board members forfeited their federal qualified

immunity because they acted without jurisdiction at a time when the Massachusetts law was clearly established,[2] highlights the actionable abuse of power by the Board. If the clear absence of jurisdiction subjects a normally, absolutely immune judge to civil liability, Bradley v. Fisher, 13 Wall 335, 351 (1872); Stump v. Sparkman, 435 U.S. 349, 356-357 (1978); see also Imbler v. Pachtman, 424 U.S. 409 (1976); Butz v. Economou, 438 U.S. 478 (1978); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Dennis v. Sparks, 449 U.S. 25 (1980); Pulliam v. Allen, 466 U.S. 522 (1984), surely a public official entitled to only qualified immunity forfeits his qualified immunity for acting in the absence of jurisdiction, especially where the official's jurisdictional limits have been clearly established. Had those limits on Zoning Board jurisdiction not been clearly established, the Massachusetts Appeals Court would not have awarded Petitioners' attorney fees (albeit only $1,000) and double costs for the Board's frivolous appeal (Appendix E).

---

2. See Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672, 322 N.E.2d 742 (1975); Amherst Growth Study Committee Inc. v. Board of Appeals v. Amherst, 1 Mass. App. Ct. 826, 827, 296 N.E.2d 717 (1973); Rafferty v. Sancta Maria Hospital, 5 Mass. App. Ct. 624, 625, 367 N.E.2d 856 (1977); Beckett v. Building Inspector of Marblehead, 6 Mass. App. Ct. 96, 97 n. 2, 373 N.E.2d 1195 (1978).

The broad but not boundary-less meaning of "property," Board of Regents v. Roth, 408 U.S. 564 ("meaning of 'liberty' . . . broad indeed," at 572) would surely lose its breadth and meaning if a person's property were worth nothing. To permit the deprivation of a property interest without the remedy of compensation lowers the constitutional status of such interests and leaves a damaged permit holder remediless for his economic losses. Such was not the intent of section 1983, and this Court ought to correct that aspect of the First Circuit's decision.

II.

The decisions below disregarded and implicitly denied Petitioners' request to offensively employ collateral estoppel based upon affirmed state court rulings in a subsequently decided civil rights challenge filed and reserved for federal court determination prior to any adjudication of the state court action restricted to state law issues.

Invoking the Full Faith and Credit Act, 28 U.S.C. § 1738, the Petitioners requested the District Court to employ offensive collateral estoppel, and to bar the waivable, untimely, nonjurisdictional defense of res judicata to Petitioners' federal claims reserved for federal court determination and not submitted for determination in Petitioners' statutorily-limited, state-law restricted action. G.L. c. 40A, § 17

dictates the statutory, ultra vires allegations that must be made in a complaint for judicial review.

Neither the District Court, which res judicated Petitioners out of federal court, Chongris v. Board of Appeals of Town of Andover, 614 F. Supp. 998, 1002 (D. Ma. 1985) (Appendix B), nor the First Circuit, 811 F.2d 36 (1st Cir. 1987) (Appendix A), even cited the invoked 28 U.S.C. § 1738, despite this Court's repeated admonition that federal courts apply the res judicata rules of the forum state, Parsons Steel Inc. v. First Alabama Bank, 106 S. Ct. 768 (1986); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984); Haring v. Prosise, 462 U.S. 306 (1983); Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980).

The issue, then, is what is the res judicata effect of a Massachusetts state court judgment, affirmed on appeal, where the Plaintiffs reserved their federal claims and restricted their state court action to state law issues.

The District Court dismissed Petitioners' reservation because there was no abstention invoked in the action, and the Circuit Court limits an England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964) reservation to the small group of cases in which one party is shunted from federal to state court, n. 4.

To be sure, no defendant formally moved to abstain, nor did the District Court need to abstain. The Petitioners willingly litigated and successfully completed their state action first. No Defendant, nor the District Court objected to this reasonable and right approach. To say that Petitioners' reservation is only effective in the context of a formal abstention is to ask that the Court engage in a needless act of formally "abstaining," Cf. Bergeron v. Estate of Loeb, 777 F.2d 792, 800 (1st Cir. 1985) (citing England for disapproval of the use of abstention to deprive litigant of federal forum). There is no question that the Court would and should have abstained, with all parties' concurrence, and stayed its hand pending state court completion, Pennzoil Company v. Texaco, Inc., 55 L.W. 4457 (1987); Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982); Catrone v. Massachusetts State Racing Commission, 535 F.2d 669 (1st Cir. 1976); American Trial Lawyers v. N.J. Supreme Court, 409 U.S. 467 (1973), and without forfeiting Petitioners' federal rights or their right "to litigate their federal claims in federal court at the conclusion of the state proceeding," Id., at 469. In light of the not unclear questions of state law presented in the state case, an interesting question is whether the Court should have abstained if the Petitioners objected to completing the state case first and wanted to litigate their federal claims first, Migra, supra, at 85. Petitioners wanted to regain their revoked permit, regainable only in state court,

and a victory in state court would obviously put Petitioners in a better position to seek damages in federal court that were unavailable under state law. If Petitioners had lost in state court, would the Petitioners have even had a federal cause of action for damages?

Permit restoration litigation in state court can also be considered a constitutionally required form of exhaustion of state court and appellate remedies, compare Huffman v. Pursue Ltd., 420 U.S. 592, 609, n. 21 (1975), with Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) (no exhaustion of state administrative remedies); a constitutionally required attempt to achieve a final decision on permissible building, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985), and a constitutionally required form of mitigation of damages, Cf. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (White, J., dissenting in part, at 2573) ; see also San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

To insist that because there was no formal abstention the Petitioners lost their announced intention to return to federal Court free from any res judicata bar is to penalize Petitioners for following the preferred and even required practice of state court completion first.

While the defensive use of collateral estoppel is applicable in civil rights actions, Allen v.

McCurry, 449 U.S. 90 (1980), Petitioners asked the District Court to offensively employ its powers and estop the zoning Defendants from relitigating issues adversely and already decided against them in the prior state court proceeding--the Board's unlawful revocation based upon its lack of jurisdiction to consider the Friends' appeal, and the valid issuance of the permit.

To be sure, the federal courts have broad discretion to fairly permit the offensive use of collateral estoppel to bar relitigation of a litigated issue, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 321 (1979); Cf. Montana v. United States, 440 U.S. 147 (1979). The question for the federal court, however, was whether Massachusetts principles of collateral estoppel would permit its offensive use here.

In Massachusetts "collateral estoppel requires the concurrence of three circumstances: (1) a common factual issue; (2) a prior determination of that issue between the same parties; and (3) a showing that the determination was in favor of the party seeking to raise the estoppel bar," Commonwealth v. Lopez, 383 Mass. 497, 420 N.E.2d 319, 321 (1981); Fireside Motors Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 479 N.E.2d 1386, 1390 (1985); see also, B.C.R. Transport Co., Inc. v. Fontaine, 727 F.2d 7, 11-12 (1st Cir. 1984).

None of the Parklane Hosiery considerations of unfairness were present here that would enable

the federal court to discretionarily decline to offensively apply collateral estoppel. The Zoning Board Respondents litigated, lost and frivolously appealed on the issues of the Board's jurisdiction and the valid issuance of the building permit. There is no possible, much less demonstrable, suggestion that the Respondents did not have a fair or full opportunity to litigate in the state court and defend the Board's jurisdiction, revocation, and decision. Cf. Durfee v. Duke, 375 U.S. 106, 116 (1963); Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 333-334 (1971); Montana v. United States, 440 U.S. 147, 162-164 (1979).

The Massachusetts Supreme Judicial Court, in Aetna Casualty & Surety Co. v. Niziolek, 395 Mass. 737, 742, 481 N.E.2d 1356, 1360-1361 (1985), decided after the District Court ruled here, endorsed the offensive use of collateral estoppel in appropriate and not unfair circumstances.

This Court, too, ought to endorse its use where a public body, already found to have acted unlawfully under state law, is sued for the violation of a persons's federal civil rights.

CONCLUSION

Petitioners ask this Court to "open (re-open or keep open) the federal courts," Mitchum v. Foster, 407 U.S. 225, 239 (1972) for a compensatory damage remedy by a private

property owner whose protected building permit was unlawfully revoked by the Andover Zoning Board of Appeals immune from damages or attorney fees under established state law. There is no fear of any federal floodgates, as the circumstances in which a zoning board or its members may be liable are limited. The greater fear is that a property owner is denied a procedure for any compensation for unlawful, official public action. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted

I. Francis Gregory, II
Attorney for Petitioners
One Bulfinch Place
Suite 100
P.O. Box 8186
Boston, MA 02114
(617) 523-0770

On the Petition:
Arthur H. Goldsmith
8 Winchester Street
Boston, MA 02116
(617) 423-1277

Appendix A

APPENDIX A--JUDGMENT, OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS, FIRST CIRCUIT DATED FEBRUARY 12, 1987

UNITED STATES COURT OF APPEALS

FIRST CIRCUIT

No. 86-1761

JAMES CHONGRIS and GEORGE CHONGRIS,

Plaintiffs/Appellants,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,

Defendants/Appellees

JUDGMENT DATED FEBRUARY 12, 1987

811 F.2d 36 (1st Cir. 1987)

Appendix A

Applicants for building permit and victualler's license brought civil rights action against town, zoning board, board members, members of town's elected governing body, and others. The United States District Court for the District of Massachusetts, Walter Jay Skinner, J., 614 F. Supp. 998, dismissed the complaint. The applicants appealed. The Court of Appeals, Selya, Circuit Judge, held that revocation of building permit did not deny applicants procedural due process or constitute taking of property.

Affirmed.

Before BOWNES, Circuit Judge, ROSENN,* Senior Circuit Judge, and SELYA, Circuit Judge.

SELYA, Circuit Judge.

James Chongris and George Chongris, brothers by birth and appellants by choice, felt mistreated at the hands of the powers-that-were in the suburban municipality of Andover, Massachusetts (Town). After they instituted a routine state court appeal of a municipal edict which stripped them of a building permit, see generally Chongris v. Board of Appeals of Andover, 17 Mass. App. 999, 459 N.E.2d 1245 (1984) (Chongris I), they sought to give the

* Of the Third Circuit, sitting by designation.

Appendix A

Town fathers their gruel by prosecuting a civil rights action in federal district court under 42 U.S.C. § 1983. They named as defendants the Town, its zoning board (Board), the individual members of the Board, the councillors of the Town's elected governing body (Selectmen), and others no longer before the court. The appellants challenged conduct attributable to the municipal defendants as well as the validity of certain state zoning statutes, viz., M.G.L. ch. 40A, §§ 11, 15 and 17. The district court eventually dismissed the suit under Fed.R.Civ.P. 12(b)(6). See Chongris v. Board of Appeals of Andover, 614 F.Supp. 998 (D.Mass.1985) (Chongris II). The plaintiffs appealed. We affirm the dismissal.[1]

---

1. Although the district court rested its decision on the doctrine of res judicata, see Chongris II, 614 F.Supp. at 1002, we elect not to reach that issue but to affirm the judgment on the independently sufficient ground that plaintiffs' complaint failed to state a cognizable federal claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). There is ample precedent for this sort of fluctuation. See Casagrande v. Agoritsas, 748 F.2d 47, 48 n. 1 (1st Cir.1984) (per curiam); Roy v. City of Augusta, 712 F.2d 1517, 1520 n. 3 (1st Cir.1983). Cf. Cloutier v. Town of Epping, 714 F.2d 1184, 1188 (1st Cir.1983). As the appellants themselves have said, "the ultimate issue in this appeal . . . is whether plaintiffs have stated, if not established,

Appendix A

I. BACKGROUND

Because this appeal follows a district court's dismissal of the action under Rule 12(b)(6), we accept the well-pleaded factual averments of the latest (second amended) complaint as true, and construe these facts in the light most flattering to the plaintiffs' cause. Kugler v. Helfant, 421 U.S. 117, 125-26 & n. 5, 95 S.Ct. 1524, 1531-32 & n. 5, 44 L.Ed.2d 15 (1975); Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (per curiam). We exempt, of course, those "facts" which have since been conclusively contradicted by plaintiffs' concessions or otherwise, and likewise eschew any reliance on bald assertions, unsupportable conclusions, and "opprobrious epithets." See Snowdon v. Hughes, 321 U.S. 1, 10, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944).

The seeds of the current dispute were sown in August of 1979, when the Town's Building Inspector issued a permit for extensive renovations to convert a building owned by George Chongris to a Dunkin Donuts franchise. James Chongris then filed an application with the

---

a civil rights claim for compensatory relief." Reply Brief for Plaintiffs/Appellants at 14. We simply take them at their word.

Appendix A

Selectmen to secure the common victualler's license which would be required for operation of the donut shop. See M.G.L. ch. 140, § 6. Shortly thereafter, a neighborhood group known as the Friends of Shawsheen Village Association (Friends) registered an objection to the issuance of the building permit. Additionally, the Friends sought to appeal the action of the Building Inspector pursuant to M.G.L. ch. 40A, §§ 8 and 15. Their petition to the Board rested upon four grounds: insufficient setback; insufficient parking; improper use of "club service"; and violation of the zoning bylaws regarding business signage.

The Board advertised a public hearing which was held on November 1, 1979. Although appellants challenge the constitutional adequacy of the notice they received, see post, it is undisputed that James Chongris attended the hearing with counsel and presented arguments in favor of the proposed conversion of the building. Indeed, they convinced the Board to take a view of the premises before acting on the appeal. On November 13, 1979, following the view--which plaintiffs claim that they were unable to attend because of the Board's failure to advise them of the schedule in a timely fashion--the Board voted unanimously to reverse the decision of the Building Inspector and to revoke the permit. Soon thereafter, the plaintiffs filed suit in state superior court under M.G.L. ch. 40A, § 17,

seeking review of the Board's action.[2] And, the

2. M.G.L. ch. 40A, § 17 provides in pertinent part as follows:

> Any person aggrieved by a decision of the board of appeals . . . may appeal to the superior court department for the county in which the land concerned is situated . . ., by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. . . . Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the decision appealed from, ...
>
> * * * * * *
>
> Costs shall not be allowed against the board . . . unless it shall appear to the court that the board . . . in making the decision appealed from acted with gross negligence, in bad faith or with malice.
>
> * * * * * * *

Appendix A

Selectmen took no significant action in respect to the victualling license, "tabling" the application.

Some eleven months after their zoning appeal had been instituted in the superior court and while it was still pending (although lying fallow), the plaintiffs filed this action in the federal district court on October 14, 1980. The complaint averred that the Friends,[3] the Board, and the Town, together with and through the individual defendants, had deprived the plaintiffs of property (i.e., the building permit) without compensation and/or due process of law. In addition, the plaintiffs alleged that the refusal of the Selectmen to act on the application for the conditional common victualler's license (or alternatively, to explain their refusal to act) likewise denied them property without due process.

All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.

3. The original complaint named the Friends, along with two functionaries (Sellers, the president of the Friends, and Terranova, the attorney and principal spokesman for the group) as defendants and coconspirators. This trio of respondents were eventually dropped as parties. They are no longer in the case.

Appendix A

In February of 1981, plaintiffs filed in both the state and federal forums a so-called "reservation" of their federal claims purporting to save adjudication of all pertinent federal law questions for the federal district court. In so doing, the plaintiffs relied upon the Supreme Court's decision in England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), vouchsafing that England stood as authority for this procedure.[4] There is nothing in the record before us to suggest that this reservation was contemporaneously called to the attention of any judge, federal or state.

---

4. In view of the approach which we find dispositive in this case, protracted discussion of the workings and extent of the England doctrine would serve no useful purpose. We note, however, that the district court has ably reviewed the pertinent precedent. See Chongris II, 614 F.Supp. at 999-1002. It suffices for today to acknowledge England, 375 U.S. at 417-18, 84 S.Ct. at 465-66, as creating a specialized mechanism whereby, in a small group of cases, a party who has been involuntarily "shunted from federal to state courts," id. at 418, 84 S.Ct. at 466, may nonetheless preserve his right to a federal court determination of essentially federal claims.

Appendix A

On December 29, 1982, the state superior court annulled the Board's revocation edict, holding that the Friends lacked standing to mount the initial challenge. The Massachusetts Appeals Court subsequently upheld the superior court's decision, see Chongris I, and the building permit was restored. Notwithstanding their state court triumph and the fact that they were able to obtain a later order of the Massachusetts Appeals Court awarding them $1782 in fees and double costs, the plaintiffs' thirst to punish the municipal defendants was unslaked. They continued to press their claims in the federal court. In March 1985, the plaintiffs filed a second amended complaint which, in addition to renewing the bread-and-butter civil rights claims and updating the facts to reflect more recent history, placed in issue the constitutionality of certain state statutes. Notice of this initiative was served on the Commonwealth's Attorney General, see M.G.L. ch. 231A, § 8, who intervened.

A spate of concentrated activity followed: the plaintiffs moved for summary judgment, the defendants filed dismissal motions, and the intervenor sought dismissal as well. On July 30, 1985, the district court allowed the motions to jettison the suit. The court found the plaintiffs' purported England reservation to be ineffective, and held that the federal claims--all of which, the district court believed, could have been litigated in the earlier state court proceeding--were barred

under principles of res judicata. See Chongris II, 614 F.Supp. at 1001-02. Nothing daunted, the plaintiffs unsuccessfully moved for reconsideration, and thereafter docketed this appeal.

II. BATTLEGROUND

The second amended complaint, structurally convoluted and verbose as it is, presents difficulties for reasoned analysis. Yet, after what wheat can be found is separated from the conspicuous quantities of chaff, the pleading can be viewed as fomenting three discrete sets of claims: those which challenge the actions of the Board in revoking the building permit, those which indict the Selectmen for refusing to issue the victualler's license, and those which attack the facial validity of the state statutes.[5] This

5. The plaintiffs also named the Town as a defendant. Yet, they offered no facts whatever which could attach liability to that entity under 42 U.S.C. § 1983. It is firmly settled--although the plaintiffs stubbornly insist to the contrary--that the civil rights statutes impose no respondeat superior liability in circumstances such as these. Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 453, 70 L.Ed.2d 509 (1981); Monell v. Department of Social Services, 436 U.S. 658, 691-94 & n. 58, 98 S.Ct. 2018, 2036-38 & n. 58, 56 L.Ed.2d 611 (1978).

triumvirate is fastened together by at least one common thread: we find that the plaintiffs, on all three theories, fail to state federally cognizable causes of action.

Before proceeding to a discussion of particular issues, however, one generic point deserves clarification. The plaintiffs have mixed and matched their assorted claims in a rather haphazard manner. George Chongris owned the premises and was the named applicant for the building permit; James, who now appears to have been an employee at will of his brother, had no real interest in the permit in his own right. Conversely, James was the sole applicant for the victualler's license, and George's standing with regard to that aspect of the case is tenebrous at best. Nevertheless, the second amended complaint draws no distinctions: James and George sponsor all claims jointly and severally. We need not dwell on this dishevelment. Inasmuch as we conclude that neither plaintiff has asserted any actionable claim for relief, we will overlook the sloppiness of the pleadings and treat the brothers as if they shared in common any entitlements which existed.

A. The Building Permit

We turn initially to the allegation that the Board's recission of the building permit was

unconstitutional. The plaintiffs seem to say that the Board denied them the procedural due process guaranteed by the fourteenth amendment to the federal Constitution in three different ways. First, they argue that the notice of the hearing on the Friends' appeal was infirm in failing to spell out in so many words that revocation of the building permit was being considered. Second, they contend that the protocol itself was fatally flawed and afforded them insufficient opportunity meaningfully to be heard. And third, the plaintiffs urge that the revocation--ordered, as it was, in connection with the appeal of a party subsequently to lack standing under Massachusetts law--constituted an independent violation of their federally protected rights.

The two essential elements of an action under 42 U.S.C. § 1983 are, of course, (i) that the conduct complained of has been committed under color of state law, and (ii) that this conduct worked a denial of rights secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1914, 68 L.Ed.2d 420 (1981); Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1526-27 (1st Cir.1983). Although the first requirement is met in this case, our painstaking excursion through the prolixities of the second amended complaint has left us utterly unable to locate any constitutional right of which the plaintiffs were

deprived when the Board revoked the building permit.

[1] Assuming for present purposes that the plaintiffs enjoyed a tenable property interest in the building permit once it had originally issued, see Cloutier v. Town of Epping, 714 F.2d 1184, 1191 (1st Cir.1983), they nevertheless have failed to demonstrate that they received less than their constitutional due. The Supreme Court has repeatedly observed that not every deprivation of property attributable to state action sinks to the depths of a fourteenth amendment violation. E.g., Parratt, 451 U.S. at 537, 101 S.Ct. at 1913. Where state procedures--though arguably imperfect--provide a suitable form of predeprivation hearing coupled with the availability of meaningful judicial review, the fourteenth amendment guarantee of procedural due process is not embarrassed. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 829-30 (1st Cir.), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982). And, as an analysis of each of the three segments of the plaintiffs' building permit lament will bear out, the procedures employed by the Board in this instance easily pass constitutional muster.

[2] 1. Notice. The claim that the Board's notices of the hearing on the Friends' appeal were constitutionally deficient--because they failed to inform the appellants explicitly that

revocation of the building permit was being considered--is hollow at its core. It is important to note that the appellants do not assert that they received no notice. The hearing was held on November 1, 1979. The plaintiffs concede that George Chongris, the owner of the premises, received notice by mail well in advance of that date. They likewise acknowledge that in mid-October notice was twice given by publication in a local newspaper of general circulation. The announcements complied fully with M.G.L. ch. 40A, § 11. Each notice apprised all concerned of the time, date, and place of the hearing, the identity of the petitioner, the location of the subject premises, and the general nature of the action. In addition, the Friends' underlying petition was filed in the Town Clerk's office as early as August 30, 1979. It was available for public inspection for over two full months before the hearing.

As required by M.G.L. ch. 40A, § 15, the petition itself spelled out, in the clearest terms imaginable, the grounds upon which it rested. See ante at 38. It was a direct and unambiguous objection to the Building Inspector's issuance of the permit. It specifically identified the zoning bylaws which, in the Friends' view, conflicted with the plaintiffs' project. The record reflects that at least one of the plaintiffs, accompanied by counsel, met with the Building Inspector to review the likely bases of the anticipated opposition a

day or two before the hearing. There was never any doubt but that reversal of the Building Inspector's decision (and thus, by necessary implication, revocation of the permit) was the objectors' desired remedy. And, given that such a remedy fell within the purview of the Zoning Board's jurisdictional authority under M.G.L. ch. 40A, § 14--a fact of which plaintiffs (who were represented throughout by counsel) had constructive knowledge, cf. Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304, 313, 496 N.E.2d 646, 651 (1986)--the appellants' belated claim that they were "surprised" by the revocation is plainly disingenuous. To be sure, they may have been "surprised" that they lost the permit (the Building Inspector, after all, was clearly on their side)--but the suggestion that they were unaware that revocation was a possible outcome of the Friends' petition and the November 1 hearing is as preposterous as it is incredible.

Due process is a flexible concept. Insofar as it may be deemed to require prior notice of certain kinds of state action, it exacts not some formulary incantation, but notice which is reasonably calculated to impart useful and pertinent information under the circumstances then obtaining. Substance governs over form. So long as a "T" is clearly portrayed as a "T," the Constitution does not mandate that it be crossed in some mythic fashion. In this instance, the

notice afforded to the plaintiffs was timely, informative, and accurate. More to the point, we find it to have been constitutionally ample.

[3] 2. Opportunity to be Heard. The appellants' protestation that they were not given an adequate chance to be heard at the proceeding which ultimately resulted in revocation of the building permit is belied by, inter alia, the attachments to the complaint. Specifically, the plaintiffs contend that the Board's failure to inform them of their right to counsel and to allow them to cross-examine witnesses at the hearing transgressed their entitlement to procedural due process. Yet, they cannot meaningfully complain that they were unaware of their right to counsel, for the record plainly reveals that an attorney represented them at the November 1, 1979 hearing and was (along with James Chongris himself) afforded an opportunity to argue in opposition to the Friends' appeal. The mere fact that the Board may not have sent an engraved invitation to the appellants suggesting that their lawyer would be welcome strikes us as altogether immaterial. What matters, from a constitutional perspective, is that the plaintiffs apparently knew that they had a right to counsel, exercised that right, and encountered no interference from the Board.

[4] The remaining aspect of the assault on the hearing protocol is equally jaundiced. George Chongris, despite having received timely written

notice, chose not to attend the session. As we have mentioned, James Chongris and the plaintiffs' attorney appeared and spoke. The Building Inspector explained to the Board why he felt the conversion should go forward. The appellants observe, correctly, that no cross-examination occurred--but they have cited no authority to suggest that they were constitutionally entitled to cross-question witnesses at a hearing of this sort. Quite the contrary is true; our cases make clear that no such forensic devices are necessary to satisfy the imperatives of procedural due process in land-use matters. In Cloutier, we held that "[f]ull judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits." 714 F.2d at 1191. And in O'Neill v. Town of Nantucket, 711 F.2d 469, 471-72 (1st Cir.1983), we flatly rejected a call for mandatory cross-examination at this type of meeting, noting that "a zoning or quasi-zoning question does not constitutionally require anything like a judicial hearing." These truths are especially self-evident where, as here, the state's courts were available to provide post-deprivation review. See Raskiewicz v. Town of New Boston, 754 F.2d 38, 44 (1st Cir.) ("where . . . the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. § 1983"), cert. denied, --- U.S. ---, 106 S.Ct. 135, 88 L.Ed.2d

111 (1985); Roy v. City of Augusta, 712 F.2d 1517, 1523 (1st Cir.1983) (similar). So, omitting cross-examination at a zoning hearing or kindred event does not amount to a denial of due process in violation of the fourteenth amendment.[6]

We do not pretend that we have exhaustively catalogued all of the ostensible hearing-related shortcomings to which the appellants have alluded. They claim, for example, that they were shortweighted in their efforts to introduce documents at the hearing and that they received overly brief notice when the Board viewed the premises. We have combed the record carefully, however, and we are convinced that it would serve no useful purpose to deal in the minutiae of the appellants' plaint. We are satisfied that, as a matter of law, taking all of the plaintiffs' factual allegations--as opposed to their unsupported conclusions and outlandish legal theories--as proven, the hearing process which the Board employed was fully consistent with what the federal Constitution demanded.

---

6. Some frosting adorns this particular piece of cake: there is nothing in the record before us, by way of averment or otherwise, to indicate that the plaintiffs ever sought to cross-examine any witness or requested that the Board cede them this "right."

Appendix A

[5] 3. Standing. The last of the plaintiffs' remonstrances against the Board reduces to the curious contention that, by acting upon the appeal of a party later found to lack standing under state law, the Board ipso facto deprived plaintiffs of property without due process of law. Such a proposition cannot survive scrutiny.

The Supreme Court has noted that not all violations of state statutes infringe constitutional rights. Paul v. Davis, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). As we observed in Creative Environments, 680 F.2d at 832 n. 9, "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes."[7]

---

7. We noted further that:

> [W]ere such a theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without

Appendix A

The case at bar blends nicely into the Creative environment.

> Viewing the matter most hospitably to the plaintiffs, as Rule 12(b)(6) necessitates, we are nevertheless unable to ascribe any constitutional deprivation to the Board's decision. To be sure, the Board was wrong; it misperceived the law and recognized the Friends when it should have discarded the petition because the neighborhood association lacked the standing required under state law. But, the mere fact that a municipal board zigged when it should have zagged, without more, will not serve to engage the heavy-duty machinery of the Civil Rights Act. Error by a zoning board is regrettable, but not federally actionable in and of itself. As we have said, a "conventional planning dispute--at least when not tainted with fundamental procedural irregularity, racial animus, or the like-- . . . does not implicate the Constitution." Creative Environments, 680 F.2d at 833. Accord Chiplin Enterprises, 712 F.2d at 1528 (outright violation

---

> due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.

Creative Environments, 680 F.2d at 831. Accord Quinn v. Bryson, 739 F.2d 8, 9 (1st Cir.1984). We unequivocally reaffirm those sentiments today.

of state law by municipal actors does not automatically raise federal claim); Roy, 712 F.2d at 1523 (same); Sucesion Suarez v. Gelabert, 701 F.2d 231, 233 (1st Cir.1983) (state agency overstepping its bounds in denying sand extraction permit does not per se equate to § 1983 claim).

We have previously held in similarly postured cases that even abridgments of state law committed in bad faith do not necessarily amount to unconstitutional deprivations of due process. E.g., Chiplin Enterprises,712 F.2d at 1528; cf. Roy, 712 F.2d at 1523. And in this case, the appellants have advised us that they abjure any suggestion of malice, ill will, or corrupt motive on the part of the Board. There is simply no inkling here of the type of egregious official behavior which could conceivably work a breach of the due process clause. Having properly pursued the route to redress which the Commonwealth provided in its courts, and having through that avenue secured the restoration of the very property of which they had been erroneously deprived, the Chongris brothers cannot plausibly claim that they were denied the process which was due them under the Constitution.

B. The Victualler's License

[6] The appellants' assertions against the Selectmen have even less nutritive value than the

charges levied against the Board. The Chongris brothers contend that there has been a bite taken out of procedural due process by reason of the Selectmen's failure (in 1979 and thereafter) to issue--or take any action on, other than to table--a conditional common victualler's license to which plaintiffs felt entitled under M.G.L. ch. 140, § 6. In serving up this bill of fare, the appellants concocted nothing upon which relief could properly have been granted below.

It is hornbook law that, to fashion a procedural due process claim under the fourteenth amendment, the plaintiffs must have possessed some constitutionally cognizable interest--in the present circumstances, a protectible property interest. Parratt, 451 U.S. at 536, 101 S.Ct. at 1913; Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). It is likewise a black-letter certainty that property rights, while protected by the federal Constitution, are creatures of state law. See Bishop v. Wood, 426 U.S. 341, 344 n. 7, 96 S.Ct. 2074, 2077 n. 7, 48 L.Ed.2d 684 (1976); Roth, 408 U.S. at 577, 92 S.Ct. 2709. We thus look to the provisions of Massachusetts law anent victualler licensure to determine if these plaintiffs had any constitutionally significant interest in the hoped-for conditional license which they say that the Selectmen refused to issue to them.

Appendix A

M.G.L. ch. 140, § 2 tells us that "[l]icensing authorities may grant licenses to persons to be innholders or common victuallers." (emphasis supplied). The statute goes on to state that it "shall not require the licensing authorities to grant either of said licenses if, in their opinion, the public good does not require it." Id. And, M.G.L. ch. 140, § 6 provides in relevant part that:

> A common victualler's or innholder's license may be issued to an applicant therefor if at the time of his application he has upon his premises the necessary implements and facilities for cooking, preparing and serving food. . . . An applicant for [such] a license . . ., proposed to be exercised upon premises which have not been equipped with fixtures or supplied with necessary implements and facilities for cooking, preparing and serving food . . . shall file with the licensing authorities a plan showing the location of counters, tables, ranges, toilets and in general the proposed set-up of the premises . . . together with an itemized estimate of the cost of said proposed set-up . . .; and thereupon the licensing authorities may grant a common victualler's . . . license . . . upon the condition that such license shall issue upon the completion of the premises according to the plans and estimate submitted,. . . . (emphasis supplied)

Appendix A

As the foregoing provisions make abundantly clear, the issuance of a conditional common victualler's license is altogether permissive. The appellants cannot possibly be said to have enjoyed an entitlement to such a license merely because they submitted a timely application for one. This has been the law of Massachusetts for, at least, half a century, when the Commonwealth's Supreme Judicial Court declared that:

> The licensing authorities are not now required to grant any licenses to common victuallers. Whether any such licenses shall be granted and, if any, the number to be granted rest in the sound judgment of the licensing board as to the demands of the public welfare in the respective communities.

Liggett Drug Co. v. Board of License Comm'rs, 296 Mass. 41, 50, 4 N.E.,2d 628, 634 (1936).

Accordingly, the appellants possessed no property interest in the conditional common victualler's license such as would entitle them to the prophylaxis of procedural due process or to relief under 42 U.S.C. § 1983. They had, at best, a mere unilateral expectation of receiving such largesse. That being so, their federal claims against the Selectmen are bootless.[8]

---

8. Although we need not proceed further, the case against the Selectmen points up the emptiness

Appendix A

C. The State Statutes

The plaintiffs launch their last constitutional missile against the facial validity of portions of the Massachusetts zoning statutes. Insofar as they bombard the sufficiency of the form of notice required under M.G.L. ch. 40A, § 11 and the adequacy of the protocol for the hearing which was held pursuant to M.G.L. ch. 40A, § 15, they do nothing more than recostume some of the constitutional claims leveled against the practices of the Board--claims which we have already rejected as unfounded. See ante Part II(A). These frayed arguments take on no added allure

---

of the plaintiffs' federal grievances. During the period when the Selectmen are accused of having engineered the "deprivation" of the victualler's license, construction of the Dunkin Donuts restaurant had not begun. For virtually all of that period, the building permit stood revoked. Thus, even if the Chongrises had the victualler's license, it would have been a meaningless piece of paper. The restaurant from which food was to have been dispensed did not exist. Here, as in Cloutier, 714 F.2d at 1193, n. 9, there is "nothing in the record to suggest a triable issue of fact on the question whether the plaintiffs suffered [any] damages" from the interdicted action.

in the garb of challenges to the constitutionality of the statutes themselves. On the basis of the reasons which we have previously articulated, we dismiss them out of hand.

[7] The appellants' last strike is new to our treatment of the issues in the case--yet we need not linger long in considering it. The plaintiffs urge that the post-deprivation remedies accorded them were constitutionally deficient. Specifically, they argue that M.G.L. ch. 40A, § 17, the pertinent text of which is set forth in the margin, see ante n. 2, fails to allow them appropriate compensation for their losses. And, we assume that such remuneration is indeed beyond their reach as a matter of state law, since they admit that the Board did not act "with gross negligence, in bad faith or with malice." See id. Because they are given no state law damages remedy for the good faith--but erroneous--revocation of the permit, the appellants contend that this means their "property" was "taken" without recompense. They conveniently overlook the ironic fact that the very statute which they now revile was itself the vehicle through which they regained the permit, and insist that the Constitution entitled them to a monetary anodyne.

The plaintiffs' fundamental assumption has been entirely discredited, however, by Parratt and its progeny. In Parratt, the Court held that

a convict whose property was lost by prison officials could not sue for damages under 42 U.S.C. § 1983 because state tort law was adequate to redress the grievance. "Although the state remedies may not provide . . . all the relief which may have been available . . . under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." Parratt, 451 U.S. at 544, 101 S.Ct. at 1917. The Court reaffirmed this principle in Hudson v. Palmer, 468 U.S. 517, 533, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984), in the context of intentional property deprivations. That state law procedures may not allow one to recover "the full amount which he might receive in a § 1983 action is not . . . determinative of the [constitutional] adequacy of the state remedies." Id. at 535, 104 S.Ct. at 3204.

Our decisions, both before and after Parratt and Hudson, are harmonious with these tenets. See, e.g., Alton Land Trust v. Town of Alton, 745 F.2d 730, 732-33 (1st Cir.1984) (rebuffing claim for damages under the due process and takings clauses where denial of subdivision application led to loss of subject property by foreclosure); Citadel Corp. v. Puerto Rico Highway Authority, 695 F.2d 31, 33-34 (1st Cir.1982) (damages not available under 42 U.S.C. § 1983 for excessive state land-use regulation), cert. denied, 464 U.S. 815, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983); Pamel Corp v. Puerto Rico

Highway Authority, 621 F.2d 33, 35-36 (1st Cir.1980) (same). The plaintiffs here are no differently situated insofar as state law remedies than were the litigants who, precedent teachers, failed to state constitutional claims in Cloutier, Chiplin Enterprises, and Creative Environments, all supra. The failure of the Massachusetts statutory scheme to confer a more generous damages entitlement falls well within the range of constitutionally acceptable choices which the Commonwealth, in our federalist system, is allowed to make. The contention that M.G.L. ch. 40A, § 17 runs afoul of the takings clause is fanciful. See Alton Land Trust, 745 F.2d at 732-33; Roy, 712 F.2d at 1523.

D. The Pending Motions

During the currency of this appeal, the appellees moved for the imposition of attorneys' fees and double costs under Fed.R.App.P. 38. They branded the entire proceeding as frivolous. The appellants, not to be outdone, cross-moved for the fees involved in defending against what they deemed to be a capricious request for sanctions.

The appellees' motion presents, we think, a relatively close question. The fact that we elected not to consider the res judicata ground on which the district court dismissed the action is not any indication that we entertained substantial

qualms about the district court's holding. Accord Casagrande v. Agoritsas, 748 F.2d at 48 N. 1 ("Although we might well agree with the district court that dismissal on the complaint is warranted because the district court lacks jurisdiction to hear the case, we choose to affirm its judgment on an independent ground.") (citations omitted). We reasoned, instead, that the case was sufficiently clear in other respects that the temptation gratuitously to enter the England thicket, see ante n. 4, should be avoided. This course of action seemed especially inviting because the district court, on the res judicata point, did not have the benefit of our opinion in Calderon Rosado v. General Electric Circuit Breakers, Inc., 805 F.2d 1085 (1st Cir.1986), and thus gave no consideration to acquiescence as a preclusory bar to invocation of a defense premised upon claim-splitting. See id. at 1087. See also Diversified Mortgage Investors v. Viking General Corporation, 16 Mass.App. 142, 450 N.E.2d 176, 179-80 (1983).[9] Since we have eschewed detailed review of the district court's rationale, however, it becomes more difficult for us, in fairness, to

---

9. We express no opinion on whether or not the appellees acquiesced in the dual filings here, or on the effect (if any) of such acquiescence. We merely remark that this issue, through no fault of the district court, was not adequately explored below.

characterize the plaintiffs' appeal as frivolous. See Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 472 (1st Cir.1985) (appeal "frivolous" when result is obvious or all arguments are wholly meritless).

[8] Although this is a borderline case, we exercise our discretion under Appellate Rule 38 to deny the appellees' motion for fees and double costs. As the prevailing parties, however, they remain, entitled to ordinary costs. The appellants' cross-motion deserves scant comment; it shows signs of confusing fantasy with reality, and is denied.

III. FOREGROUND

We recapitulate briefly. Although the second amended complaint is a massive document--it comprises 32 pages, includes some 125 separate paragraphs, and incorporates by reference a host of documents--a linguistic avalanche cannot serve to make out a constitutional claim where none exists. We have reviewed the tens of thousands of words and found nothing of federally cognizable substance. We have considered all of the plaintiffs' many arguments, including but in no way limited to those discussed above, and have found them to be entirely wanting. No matter how assiduously Aladdin's Lamp is rubbed, the genie of federal jurisdiction does not appear: taking the well-

pleaded facts and the reasonable inferences therefrom in the light most favorable to the plaintiffs, no claim is stated against any defendant on which the district court could have granted relief.

We can understand, if not appreciate, the appellants' frustration. As they view the mise-en-scene, it is long since past "time to make the donuts"--but remodelling of the facility was stalled for several years while the battle over the building permit was waged. Yet, as we have repeatedly cautioned, the expenditure of time and money is "[a]n unfortunate but unavoidable aspect of all litigation." Roy, 712 F.2d at 1523. The plaintiffs have little choice but to accept that reality. They cannot be allowed to prolong their ill-conceived attempts to punish the Town, or the Board, of municipal officials in general for simply doing their jobs--even if tasks were imperfectly performed. The Civil Rights Acts cannot be used as a rack upon which every disappointed developer can stretch a community that fails to roll out the red carpet for him.

For these reasons, the judgment of the district court is

Affirmed.

Appendix B

APPENDIX B--MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, D. MASSACHUSETTS, DATED JULY 30, 1985

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

Civ. A. No. 80-2316-S

JAMES CHONGRIS and GEORGE CHONGRIS,
Plaintiffs,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,
Defendants

614 F. Supp. 998 (D. Ma. 1985)

Complaint challenging revocation of permit to build donut shop and validity of certain state zoning review, notice, and appeal procedures was filed, and counterclaim for abuse of process was also asserted. On defendants' motion to dismiss the complaint, and plaintiffs' motion for summary judgment, the District Court, Skinner, J., held that: (1) plaintiffs, who had filed suit in state court seeking review of revocation of permit prior to filing instant action in federal district court, were not entitled to avail themselves of the right to reserve a federal forum; (2) instant action was

barred by doctrine of res judicata; but (3) claims asserted in instant action were not so lacking in merit as to constitute an abuse of process.

Motions to dismiss complaint and counterclaim allowed.

MEMORANDUM AND ORDER

SKINNER, District Judge.

In this case, plaintiffs challenge the actions of the Andover Board of Appeals (the "Board") as well as the validity of certain state zoning review, notice and appeal procedures, set out in M.G.L. ch. 40, §§ 11, 15 and 17, on constitutional and federal statutory grounds. Plaintiffs also seek compensatory damages, attorney's fees, declaratory relief and an injunction restraining the defendants from interfering with plaintiffs' "rights or business". The Board answered, asserted a counterclaim for abuse of process, and moved to dismiss plaintiffs' complaint on various grounds. Plaintiffs, in turn, moved for summary judgment.

This longstanding dispute began in August of 1979 when the plaintiffs received a permit to build a Dunkin Donuts shop in Andover, Massachusetts from Andover Building Inspector William Meins. The permit was issued over the objections of a local voluntary citizens' organization, the Friends of Shawsheen Village

Association ("Friends").

On August 30, 1979, the Friends filed a letter with the Board seeking to appeal Inspector Meins' decision. Notice of a hearing on the appeal was published and mailed to "interested parties" (presumably including the plaintiffs). The notice and petition for appeal stated four grounds for opposing the permit: insufficient setback; insufficient parking; improper use of "curb service"; and violation of zoning bylaws pertaining to business signs.

The Board held a public hearing on the Friends' petition on November 1, 1979. Plaintiffs allege that they were not permitted to cross-examine witnesses at the hearing and were not given adequate notice of the substance of the issues to be addressed. James Chongris and his attorney attended the hearing, however, and convinced the Board and the Friends to take a view of the premises before acting on the appeal.

On the morning of November 10, 1979, the Board and Friends viewed the premises. James Chongris claims that he and his attorney received notice of the time of the view at 8:00 a.m. that morning and were therefore unable to attend.

On November 13, 1979, the Board unanimously voted to revoke plaintiffs' permit. Shortly thereafter, plaintiffs filed a suit in state

Appendix B

Superior Court seeking review of the revocation. Prior to receiving the Board's answer in that action, plaintiffs filed this action in federal court on October 14, 1980. In February, 1981, plaintiffs filed in both superior and federal court a reservation of their federal claims pending completion of the state court case.

The Essex County Superior Court annulled the Board's permit revocation on December 29, 1982, finding that the Friends did not have standing to challenge the issuance of the permit. That decision was subsequently upheld by the Massachusetts Appeals Court on February 15, 1984. See Chongris v. Board of Appeals of Andover, 17 Mass.App. 999, 459 N.E.2d 1245 (1984).

[1, 2] The defendants have moved to dismiss plaintiffs' instant federal claims on the ground of res judicata. It is settled that federal courts are to give state court judgments the same preclusive effect that state law prescribes. 28 U.S.C. § 1738; Sires v. Gabriel, 748 F.2d 49 (1st Cir.1984). Under Massachusetts law, the doctrine of res judicata prevents the relitigation of issues that were or could have been litigated in a prior action. Id. The defendants conclude that, because plaintiffs' constitutional and federal statutory claims could have been raised in their prior action in Essex Superior Court, those claims are barred.

Appendix B

Plaintiffs contend that they effectively reserved their right to litigate their federal claims separately in this court pursuant to their February 1981 reservation. In support of this theory, plaintiffs rely upon England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1963). My examination of the purpose and history of the doctrine of reservation of rights, however, leads me to conclude that plaintiffs' argument is without merit and that this action is barred by virtue of the prior state case.

The doctrine of reservation of rights was first formally articulated in England. There, the Court attempted to resolve uncertainties created by two of its prior cases dealing with abstention: Government Employees v. Windsor, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894 (1963) and NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

In Windsor, plaintiff labor union initially brought suit in the federal district court seeking to enjoin, on constitutional grounds, the enforcement of a state statute regulating "labor union[s] or labor organization[s]". The district court retained the case but withheld exercise of its jurisdiction in order to permit plaintiffs first to exhaust state remedies.

Plaintiffs thereupon sought a ruling from the state courts as to whether they were subject to the statute. Plaintiffs, however, did not raise their constitutional challenges at the state level. The state's highest court eventually held that the union was subject to the statute but offered no opinion as to the statute's constitutionality.

Upon receiving the adverse state judgment, plaintiffs returned to the federal district court in order to raise their constitutional challenge. The district court dismissed the case stating that the state "courts have not construed the [challenged statute] 'in such a manner as to render it unconstitutional, and, or course, we cannot assume that the State courts will ever so construe said statute.'" 353 U.S. at 366, 77 S.Ct. at 839 (quoting 146 F.Supp. 214, 216).

On appeal, the United States Supreme Court remanded the case to the district court "with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted." Id., 353 U.S. at 367, 77 S.Ct. at 839.

In support of this result, the Court explained that

> [I]n an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain

> jurisdiction until a definitive determination of local law questions is obtained from the local courts. One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. (citation omitted) Another policy served by the practice is the avoidance of the adjudication of abstract, hypothetical issues. Federal courts will not pass upon constitutional contentions presented in an abstract rather than in a concrete form. (citation omitted) The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner.

Id. at 366, 77 S.Ct. at 839.

In NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), plaintiffs brought suit in federal court challenging the constitutionality of certain state statutes which had never been construed by the state courts. The federal court abstained in order to permit plaintiffs to seek an interpretation of the statute

in state court. Unlike the plaintiffs in Windsor, however, the NAACP sought a determination by the state court as to whether the statute applied to their activities and, if so, whether it was constitutional. The state courts found that the statutes applied to the NAACP and also were constitutional.

Thereupon the NAACP filed a petition for certiorari in the United States Supreme Court.

Before reaching the merits, the Court questioned whether it could properly take jurisdiction over the case in light of the federal district court's previous abstention. The Court specifically noted that when a federal court abstains, it merely postpones exercise of its jurisdiction, it does not entirely abdicate it. 371 U.S. at 427, 83 S.Ct. at 335. The Court concluded, however, that plaintiffs were not required to return to the district court because they had unreservedly submitted all their claims to the state court. The Court explained that where

> the party remitted to the state courts elects to seek a complete and final adjudication of his rights in the state courts, the District Court's reservation of jurisdiction is purely formal, and does not impair our jurisdiction to review directly an otherwise final state court judgment. (Citation omitted). We think it clear that

> petitioner made such an election in the instant case, by seeking from the Richmond Circuit Court, "a binding adjudication" of all its claims and a permanent injunction as well as declaratory relief, by making no reservation to the disposition of the entire case by the state courts, and by coming here directly on certiorari.

Id. at 427-28, 83 S.Ct. at 335.

Finally, in England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1963), plaintiff chiropractors originally brought suit in federal court seeking both an interpretation of a state statute regulating medical licenses, and, if the statute were found to apply to them, a ruling on its constitutionality. The federal district court abstained, as did the lower federal courts in Windsor and Button, and "shunted" plaintiffs to state court. After litigating and losing both their state and federal claims in state courts, plaintiffs attempted to return to federal district court. The district court dismissed plaintiffs' second action on the ground that their proper remedy was by appeal to the Supreme Court of the United States. The dismissal was upheld by the Court of Appeals and plaintiffs sought review in the Supreme Court.

Overturning the courts below, the Court, through Justice Brennan, held that

> in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be deprived of that determination . . . he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state court hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.

375 U.S. at 417, 421, 84 S.Ct. at 465, 467.

The Court thus made clear that the right to reserve a federal forum was intended strictly to protect plaintiffs in "abstention cases":

> The line drawn should be bright and clear, so that litigants shunted from federal to state courts by application of the abstention doctrine will not be exposed, not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims.

Id. at 418, 84 S.Ct. at 466.

[3] In light of the above, it is clear that the right to reserve the federal forum was created

as an accommodation between the duty of federal courts to accept jurisdiction of federal cases, and the policy of abstention in order to allow state courts to construe their statutes in the context of a constitutional challenge. Indeed, the Supreme Court recently stated that "[t]he holding in England depended entirely on this Court's view of abstention . . ." Allen v. McCurry, 449 U.S. 90, n. 17, 101 S.Ct. 411, n. 17, 66 L.Ed.2d 308 (1980). I therefore find no reason to extend England beyond its intended scope.

[4] In contrast to the plaintiffs in Windsor, Button and England, plaintiffs here were not seeking an interpretation of a state statute as a predicate to a constitutional challenge. Quite the contrary, plaintiffs admit in their brief that "Massachusetts law [in this case] was clearly established . . ." at the time of the state court action. Thus, the present case is not one in which the doctrine of abstention could properly have been invoked. Plaintiffs were not entitled to avail themselves of the rule in England. Plaintiffs were not shunted to the state court; they went there on their own in order to seek relief that they could get only there. That they also would like relief under federal law gives them no right to split their cause of action and harass the defendants with a marathon course of litigation.

[5] Because plaintiffs could have raised the instant federal claims in their prior state

court action, I find this action barred by the doctrine of res judicata.

The plaintiffs conceded in oral argument that denial of a common victualler's license does not raise a federal issue.

Accordingly, the defendants' motion to dismiss plaintiffs' complaint is ALLOWED.

[6] While plaintiffs' claims ultimately failed, I do not find them so lacking in merit as to constitute an abuse of process. Accordingly, plaintiffs' motion to dismiss defendant's counterclaim is ALLOWED.

Appendix C

APPENDIX C--ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT, D. MASSACHUSETTS, DATED JULY 23, 1986

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS
Civ. A. No. 80-2316-S

JAMES CHONGRIS and GEORGE CHONGRIS,

Plaintiffs,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,

Defendants

DENIED. Neither Gumley v. Bd. of Selectmen of Nantucket, 358 N.E.2d 1011 (1977) nor Tsongas v. Sec'y of the Commonwealth, 291 N.E.2d 149 (1972) reach the question of the preclusive effect of a state court judgment.

Skinner, J.

IT IS ORDERED AND ADJUDGED pursuant to the Court's denial of the plaintiffs' motion to amend, alter and/or correct the Court's Memorandum and Order dated July 30, 1985, JUDGMENT OF DISMISSAL IS HEREBY ENTERED.

Appendix D

APPENDIX D--OPINION AND JUDGMENT OF THE MASSACHUSETTS APPEALS COURT, DATED FEBRUARY 15, 1984

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 83-394

JAMES CHONGRIS and GEORGE CHONGRIS,

Plaintiffs/Appellees,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,

Defendants/Appellants

17 Mass. App. Ct. 999, 459 N.E.2d 1245
(Mass. App. Ct. 1984).

George Chongris & another vs. Board of Appeals of Andover & others. February 15, 1984. Zoning, Appeal, Parties, Practice, Civil, Zoning appeal, Summary judgment. Rules of Civil Procedure. Words, "Person aggrieved."

Dissatisfied with the building inspector's issuance of a permit to George Chongris to build a Dunkin Donuts in the town of Andover, the

Appendix D

Friends of Shawsheen Village Association (Friends), appealed from the building inspector's decision to the board of appeals pursuant to G.L. c. 40A, § 8, inserted by St. 1975, c. 808, § 3, and the zoning by-law of Andover. The board of appeals determined that the plans for the proposed building did not provide adequate parking under the town's zoning by-law and ordered revocation of the permit. Chongris, the landowner, appealed under G.L. c. 40A, § 17, and, by motion for summary judgment, Mass.R.Civ.P. 56, 365 Mass. 824 (1974), attacked the standing of Friends to challenge his permit. The judge concluded Friends was not a "person aggrieved" within the meaning of G.L. c. 40A, § 8, or the zoning by-law and that, accordingly, the board was without jurisdiction to entertain Friends' appeal. Judgment entered annulling the board's decision and "declaring" that the landowner's permit was in full force and effect. We affirm.

Friends, according to its by-laws, is a voluntary association whose objective is to "promote the preservation, restoration, and advancement, of Shawsheen Village." In challenging the building permit at issue it demonstrated nothing more than a "general civil interest in the enforcement of the zoning [regulation]." Waltham Motor Inn, Inc. v. LaCava, 3 Mass. App. Ct. 210, 218 (1975). Owens v. Board of Appeals of Belmont, Mass.

Appendix D

App. Ct. Adv. Sh. (1981) 731. It is settled that a statement of organizational purpose cannot clothe a civic association with aggrieved person status. Amherst Growth Study Comm. v. Board of Appeals of Amherst, 1 Mass. App. Ct. 826, 827 (11973). Cf. Save the Bay, Inc. v. Department of Pub. Util., 366 Mass. 667, 672-675 (1975). At no point in the proceedings has Friends asserted that any of its legal rights have been infringed. See Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 430 (1949).

Typically, challenges to a party's aggrieved person status arise when a party seeks judicial review of a decision of a board of appeals under G.L. c. 40A, § 17. See, e.g., Marotta v. Board of Appeals of Revere, 336 Mass. 199 (1957), brought under a predecessor, but essentially similar, statute, in which the court observed that the Superior Court had no jurisdiction to consider the case unless the appeal was taken by an aggrieved person. Id. at 202-203. In the instant action the challenge is under G.L. c. 40A, § 8, which provides that the first avenue of relief from an order or decision of a building inspector is to the board of appeal and that the route may be taken only by a person aggrieved. See Neuhaus v. Building Inspector of Marlborough, Mass. app. Ct. Adv. Sh. (1981) 161, 163-164. Aggrieved person status is no less a jurisdictional condition to maintaining an appeal to a board of appeal under G.L. c. 40A, § 8, than it is to maintaining

judicial review under § 17. See Turner v. Board of Appeals of Milton, 305 Mass. 189, 1920193 (1940), also decided under a predecessor statute. As the court in the case crisply said of the party seeking relief before the board of appeal, "[He] had no right to file it and the board had no authority to hear it." Id. at 193.

Friends gained no ground by acting through its president, James Sellers, a resident of Andover. The record fails to disclose that Sellers ever alleged that he, as an individual property owner, was harmed by the building inspector's issuance of the permit. He was neither an abutter, nor an abutter to an abutter, of the lot for which the permit was issued. Rafferty v. Sancta Maria Hosp., 5 Mass. App. Ct. 624, 629-630 (1977). Compare Save the Bay, Inc. v. Department of Pub. Util., 366 Mass. at 675. Sellers could not establish that he had an interest in maintaining the district as it was zoned, since the proposed Dunkin Donuts was a use allowed within the general business zone in which the locus was situated. See Rafferty, supra. Neither Friends nor Sellers offered anything in the record which might have entitled them to presumptive status as an aggrieved person (a presumption, in any event, rebuttable). See Marotta v. Board of Appeals of Revere, 336 Mass. at 204; Waltham Motor Inn, Inc. v. LaCava, 3 Mass. App. Ct. at 217; Redstone v. Board of Appeals of Chelmsford, Mass. App. Ct. Adv. Sh. (1981) 351.

Appendix D

Friends also contends that the trial judge erred in allowing Chongris's motion for summary judgment to be scheduled for a hearing within seven days rather than ten days, of when the motions were served. Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974). "Every violation of a procedural rule, however, need not--and should not--require the perpetrator to be undone." US Trust v. Kennedy, 17 Mass. App. Ct. 131, 135 (1983). Chongris's lawyer alerted Friends of his intention to list the motions as early as one month before the scheduled hearing date. Eighteen days prior to the hearing, Chongris's lawyer notified Friends' lawyer, by letter, of the exact date on which he would move for summary judgment. Moreover, Chongris's complaint left no doubt that Friends' standing to appeal the permit to the board of appeals was at issue. In the circumstances, the failure in technical compliance worked no prejudice against Friends and the judge acted well within his discretion. See White v. Peabody Constr. Co., 386 Mass. 121, 127 (1982). We need not reach Friends' other claims of error.

Judgment affirmed.

Appendix E

APPENDIX E--ORDER OF THE APPEALS COURT, COMMONWEALTH OF MASSACHUSETTS DATED APRIL 25, 1984

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 83-394

GEORGE CHONGRIS and another

vs.

BOARD OF APPEALS OF ANDOVER & others

ORDER DATED APRIL 25, 1984

Upon consideration of the appellees' motion for double costs and fees, to which no response was made, the court awards double costs and a fee of $1,000.

By the Court (Brown, Kass, & Warner, JJ.),

Entered: April 25, 1984

Appendix F

APPENDIX F--DECLARATORY JUDGMENT OF THE ESSEX (MA) SUPERIOR COURT, DATED DECEMBER 29, 1982

COMMONWEALTH OF MASSACHUSETTS
ESSEX SUPERIOR COURT
No. 16191

GEORGE CHONGRIS and JAMES CHONGRIS,
Plaintiffs,

vs.

FRIENDS OF SHAWSHEEN VILLAGE ASSOCIATION, ET ALS,
Defendants

This action came on before the Court upon the plaintiff's motion for summary and declaratory judgment, Ronan, J., presiding.

After hearing, and argument of all counsel, the Court finds that the Friends of the Shawsheen Village Asscciation is not an aggrieved person either under General Laws Chapter 40A or Andover By-Law VIII B2Ca. It is therefore ORDERED that the decision of the Andover Zoning Board of appeals of November 18, 1979 is annulled and that the building permit issued regarding 849 No. Main Street was validly issued and is in full force and effect.

By the Court, Ronan, J.
Date: December 29, 1982

Appendix G

APPENDIX G--DECISION OF THE BOARD OF APPEALS UNDER ZONING BY-LAW, TOWN OF ANDOVER, MASSACHUSETTS, UPON THE PETITION OF FRIENDS OF SHAWSHEEN VILLAGE ASSOCIATION, DATED NOVEMBER 13, 1979

#1349

A meeting of the Board was held in The Hall, second floor, Memorial Hall Library, commencing at 7:30 P.M. on Thursday, November 1, 1979. There were present: Albert F. Cullen, Jr., Chairman; Jane E. Griswold, Clerk; Wesley E. Whitney and Richard H. Moody, Members and Robert P. Levinson, Associate Member.

Pursuant to public notice in the Andover Townsman, a newspaper of general circulation in the Town of Andover, published on October 18 and 25, 1979 and pursuant to notice sent by mail, postage prepaid, to all interested parties pursuant to the provisions of Massachusetts General Laws, a public hearing was held on the petition of Friends of Shawsheen Village Association, c/o James R. Sellers, 40 York Street, Andover, Mass. filed on August 30, 1979 as a person aggrieved by a decision of the Inspector of Buildings in granting a building permit to George Chongris and/or James Chongris for the construction of a proposed Donut Shop at 349 North Main Street.

Appendix G

Premises affected are located at 349 North Main Street, Andover, Mass. in a General Business District and is shown on Assessor's Map 52 as Lot 31.

The petitioners were represented by Attorney Domenic s. Terranova of Andover. Attorney Terranova's principal argument was that there are not sufficient parking spaces on the lot to accommodate all of the uses which will be made of the land as required by Section VI of the Zoning By-Law. In support of this position he offered evidence that the Shawsheen Manor Hotel contained more than 16 sleeping units as allowed by the Inspector of Buildings. The evidence consisted, in part, of an application and license for alcoholic beverages issued by the Town of Andover to Shawsheen Manor, Inc., George Chongris, Manager, dated July 31, 1975, in which it is stated that there are 53 guest rooms in the Manor. Attorney Terranova represented that he had seen the current application and license, and that there was no change from the earlier license.

The Board questioned the Inspector of Buildings at the hearing who stated that the Building Department records reflected 47 sleeping units as of the last inspection on or about February 23, 1979. He also stated that he put a note in his records at that time that a number of the sleeping units were not in use. He also said that at the time the permit was issued in August,

1979, he accepted the applicants' statement that only 16 sleeping units were currently in use. He further said that he did not independently ascertain the number of sleeping units.

Attorney John Ford of Lawrence and James Chongris were present on behalf of Shawsheen Manor, Inc. Mr. Chongris represented that only 16 sleeping units were currently in use, that 5 sleeping units on the third floor were presently being used as a single family residence, and that a number of sleeping units were presently occupied by offices and had been since early 1978. In addition, Mr. Chongris said that a number of sleeping units were currently being used for storage and that a number of them were uninhabitable.

Attorney Terranova also offered evidence that Restaurant Brokers of America, who are acting as agents for Shawsheen Manor, Inc., had represented to Sebastian Marino, a member of the Friends of Shawsheen Village Association, that the restaurant would seat 120 and the lounge 40. Mr. Marino was present at the hearing and corroborated his discussion with the Restaurant Brokers of America.

The Inspector of Buildings stated that the restaurant was not currently in use.

Appendix G

Attorney Terranova had the Inspector of Buildings produce the parking plan proposed by Shawsheen Manor, Inc., in connection with its application for a building permit. The plan showed 88 spaces. Attorney Terranova argued that there was not sufficient area to accommodate 88 vehicles and leave adequate circulation area for pedestrians and vehicles.

Attorney Terranova also argued that the proposed use as a doughnut shop was a curb service operation and not permitted by the Zoning By-Law. He argued that the building should be set back farther than proposed due to the requirements of Section V.B.7b. of the Zoning By-Law.

Attorney Terranova pointed out that there is an existing sewer line which is located under the site of the proposed use.

The Board took a view of the outside of the premises.

Based upon the evidence presented at the hearing and the view taken the Board finds that more parking spaces are required than the 88 shown on the plan and the application for permit to build.

The Application for Permit to build does not include a parking space for the residence on the

third floor of the Manor. Further in determining the number of parking spaces required under Section VI.A.5.b(7) of the Zoning By-Law, the Board finds that in order to compute the number of sleeping units it is necessary to count all units which meet health, building and zoning law requirements for hotel rooms. All evidence submitted at the hearing clearly and convincingly established that there are in fact more than 16 sleeping units in the Manor. The alcoholic beverage license as well as the Building Department records show more than 16 sleeping units. There were no records offered or referred to which would indicate that the number of sleeping units had been reduced by physical alteration so as to be no longer useable as sleeping units. Since the Inspector of Buildings admittedly did not inspect the premises to determine the number of sleeping units, and public records and statements of Mr. James Chongris at the hearing clearly indicate that there are in fact additional sleeping units available, the Board concludes that 88 parking spaces do not meet the requirements of the Zoning By-Law.

With respect to the number of parking spaces required for the restaurant use the Board is concerned with the apparent discrepancy between the applicants' representations on the application as to the number of seats in the restaurant and lounge and the statements attributed to its' agent by Mr. Marino.

Appendix G

There is the possibility that more parking spaces are required for the restaurant and lounge.

Based upon the view, the Board is not convinced that there is adequate area to provide for parking and circulation of 88 vehicles and pedestrians.

The Board finds no merit in the arguments of the Friends of Shawsheen relating to the proposed use being a curb service operation or that the setback requirements are governed by Section V.B.7.b of the Zoning By-Law.

After consideration of the foregoing, the Board reverses the decision of the Inspector of Buildings, orders the Building Permit revoked and directs the Inspector of Buildings to take the necessary steps to carry out the order.

Albert F. Cullen, Jr., Chairman
Jane E. Griswold, Clerk
Wesley E. Whitney, Member
Richard H. Moody, Member
Robert P. Levinson, Associate Member

Dated: November 13, 1979

Appendix H

APPENDIX H--M. G. L. Ch. 40A

§ 11. Notice requirements for public hearings; parties in interest defined; review of special permit petitioner; recording copies of special permit and variance decisions

In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. "Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city of town, and the planning board of every abutting city or town. The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of

parties in interest and such certification shall be conclusive for all purposes. The permit granting authority or special permit granting authority may accept a waiver of notice from, or an affidavit of actual notice to any party in interest or, in his stead, any successor owner of record who may not have received a notice by mail, and may order special notice to any such person, giving not less than five nor more than ten additional days to reply.

Publications and notices required by this section shall contain the name of the petitioner, a description of the area of premises, street address, if any, or other adequate identification of the location, of the area or premises which is the subject of the petition, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of action or relief requested if any. No such hearing shall be held on any day on which a state or municipal election, caucus or primary is held in such city or town.

Zoning ordinances or by-laws may provide that petitioner for special permits shall be submitted to and reviewed by one or more of the following and may further provide that such reviews may be held jointly:--the board of health, the planning board or department, the city or town engineer, the conservation commission or any other town agency or board. Any such board or agency to which petitions are referred for review

shall make such recommendations as they deem appropriate and shall send copies thereof to the special permit granting authority and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto.

Upon the granting of a variance or special permit, or any extension, modification or renewal thereof, the permit granting authority or special permit granting authority shall issue to the owner and to the applicant if other than the owner a copy of its decision, certified by the permit granting authority or special permit granting authority, containing the name and address of the owner, identifying the land affected, setting for compliance with the statutory requirements for the issuance of such variance or permit and certifying that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk. No variance or special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the town or city clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the

county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The fee for recording or registering shall be paid by the owner or applicant.

§ 15. Appeals to permit granting authority; notice; time; boards of appeal hearings; procedure

Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed, by filing a notice of appeal, specifying the grounds thereof, with the city or town clerk, who shall forthwith transmit copies thereof to such officer or board whose order or decision is being appealed, and to the permit granting authority. Such officer or board shall forthwith transmit to the board of appeals or zoning administrator all documents and papers constituting the record of the case in which the appeal is taken.

Any appeal to a board of appeals from the order or decision of a zoning administrator, if any, appointed in accordance with section thirteen shall be taken within thirty days of the date of such order or decision or within thirty days from the date on which the appeal, application or

petition in question shall have been deemed denied in accordance with said section thirteen, as the case may be, by filing a notice of appeal, specifying the grounds thereof with the city or town clerk who shall forthwith transmit copies thereof to the zoning administrator and, in the case of an appeal under section eight to the officer whose decision was the subject of the initial appeal to said zoning administrator. The zoning administrator shall forthwith transmit to the board of appeals all documents and papers constituting the record of the case in which the appeal is taken. All applications for special permits or petitions for variance over which the board of appeals or the zoning administrator as the case may be, exercise original jurisdiction shall be filed by the petitioner with the city or town clerk who shall forthwith transmit a copy thereof to the board of appeals or to said zoning administrator.

Meetings of the board shall be held at the call of the chairman or when called in such other manner as the board shall determine in its rules. The board of appeals shall hold a hearing on any appeal, application or petition transmitted to it by the city or town clerk within sixty-five days from the transmittal to it by the city or town clerk within sixty-five days from the transmittal to the board of such appeal, application or petition. The board shall cause notice of such hearing to be published and sent to parties in interest as

provided for herein, and shall notify the planning board of the city or town and, the planning board of adjacent cities and towns which may forward recommendations with respect to said matter for the consideration of the board of appeals. The chairman, or in his absence the acting chairman, may administer oaths, summon witnesses, and call for the production of papers.

The concurring vote of all the members of the board of appeals consisting of three members, and a vote of four members of a board consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law.

All hearings of the board of appeals shall be open to the public. The decision of the board shall be made within seventy-five days after the date of the filing of an appeal, application or petition except in regard to special permits, as provided for in section nine of this chapter. Failure by the board to act within said seventy-five days shall be deemed to be the grant of the relief, application or petition sought, subject to an applicable judicial appeal as provided for in this chapter. The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason or reasons for

its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be a public record; and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of city or town clerk.

§ 17. Judicial review

Any person aggrieved by a decision of the board of appeals or any special permit granting authority, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the superior court department for the county in which the land concerned is situated or, if the land is situated in Hampden county, either to said superior court department or to the division of the housing court department for said county, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of

the district court department, any party shall have the right to file a claim for trial of said appeal in the superior court departmnet within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of

the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed. No answer shall be required but an answer may be filed and notice of such filing with a copy of the answer and an affidavit of such notice given to all parties as provided above within seven days after the filing of the answer. Other persons may be permitted to intervene, upon motion. The clerk of the court shall give notice of the hearing as in other cases without jury, to all parties whether or not they have appeared. The court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.

Appendix H

A city or town may provide any officer or board of such city or town with independent legal counsel for appealing, as provided in this section, a decision of a board of appeals or special permit granting authority and for taking such other subsequent action as parties are authorized to take.

Costs shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice.

Costs shall not be allowed against the party appealing from the decision of the board or special permit granting authority unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court.

All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.

Appendix I

APPENDIX I--TOWN OF ANDOVER, ZONING BY-LAW

SECTION IV. USE REGULATIONS

A. Permitted Uses

No land in any use district nor any building or part thereof now or hereafter erected thereon shall be used for any purpose except such uses as are permitted:

1. as matter of right, denoted by the letter "Y" in the following Table of Uses:

B. Table of Use Regulations

Business and Commercial Uses:

17. Restaurant or other establishment for the sale and consumption of food on the premises but excluding a curb service operation.

Residence				Business		
SRA	SRB	SRC	APT	SC	OP	GB
N	N	N	N	BA	N	Y

Supreme Court, U.S.
FILED
JUN 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1789

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES AND GEORGE CHONGRIS,

Petitioners-Appellants,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,

Respondents-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENT-APPELLEE IN OPPOSITION

JAMES M. SHANNON
ATTORNEY GENERAL
Commonwealth of
Massachusetts

SUZANNE E. DURRELL
Counsel of Record
Assistant Attorney General
One Ashburton Place,
Boston, MA 02108
(617) 727-1010

QUESTION PRESENTED

Whether the post-revocation appeal provisions of the Massachusetts Zoning Act provide an adequate state law remedy under the Due Process Clause of the Fourteenth Amendment to the United States Constitution for a developer whose building permit is revoked by a local zoning board, and whether the pre-revocation notice and hearing provisions of that statute comply with due process.

PARTIES

This Brief in Opposition is submitted on behalf of the Attorney General of the Commonwealth of Massachusetts who intervened as a defendant in the District Court for the sole purpose of defending the facial validity of §§ 11, 15, and 17 of Mass. G. L. c. 40A, the state Zoning Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
A. The Statute Provides An "Adequate" And "Meaningful" State Law Remedy.	11
B. The Pre-Deprivation Notice and Hearing Provided By The Statute Satisfy Procedural Due Process.	18
C. This Case Does Not Involve A Taking Of Private Property For A Public Use.	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
Alton Land Trust v. Town of Alton, 745 F.2d 730 (1st Cir. 1984)	15, 16
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	14
Atkins v. Parker, 105 S. Ct. 2520 (1985)	21
Boddie v. Connecticut, 401 U.S. 371 (1971)	21
Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304, 496 N.E.2d 646 (1986)	23n
Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983)	15, 16
Chongris v. Board of Appeals, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (1984)	5
Clark v. Bissonnette, 604 F. Supp. 710 (D. Mass. 1985)	15, 16
Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985)	20, 21, 21n
Cloutier v. The Town of Epping, 714 F.2d 1184 (1st Cir. 1983)	15, 16, 24

Page

Creative Environments, Inc., v. Estabrook, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982) 11n, 17

DiGiovanni v. Board of Appeals of Rockport, 19 Mass. App. Ct., 339 N.E.2d 198, review denied, 394 Mass. 1103, 477 N.E.2d 595 (1985) 22n

Gildea v. Ellershaw, 363 Mass. 80, 298 N.E.2d 847 (1973) 11n

Goldberg v. Kelly, 397 U.S. 254 (1970) 21n

Hudson v. Palmer, 468 U.S. 517 (1984) 10, 13

Limerick v. Greenwald, 749 F.2d 97 (1st Cir. 1984) 16n

Mathews v. Eldridge, 424 U.S. 319 (1976) 21

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 20

Parratt v. Taylor, 451 U.S. 527 (1981) 10, 13

Quinn v. Bryson, 739 F.2d 8 (1st Cir. 1984) 15, 16

Ramos v. Board of Selectmen of Nantucket, 16 Mass. App. Ct. 308, 450 N.E.2d 1125 (1984) 11n, 12

Page

Raskiewicz v. Town of New Boston, 754 F.2d 38 (1st Cir.), cert. denied, 106 S. Ct. 135 (1985) 11n

Roslindale Cooperative Bank v. Greenwald, 638 F.2d 258 (1st Cir.), cert. denied, 454 U.S. 831 (1981) 16n

Roy v. City of Augusta, Maine, 712 F.2d 1517 (1st Cir. 1983) 14, 15

Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, (1985) 14

United States Constitution

Fifth Amendment 26

Fourteenth Amendment 26

Due Process Clause passim

Federal Statutes

42 U.S.C. § 1983 5

Massachusetts Statutes

Mass. G.L. c. 40A 12, 23n

Mass. G.L. c. 40A, § 8 2, 3

Mass. G.L. c. 40A, § 11 2, 11, 18, 25

	Page
Mass. G.L. c. 40A, § 15	7, 19, 22n, 23, 25
Mass. G.L. c. 40A, § 17	3, 6, 9
Mass. G.L. c. 231A	12
Mass. G.L. c. 231A, § 8	8

NO. 86-1789

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES AND GEORGE CHONGRIS,

Petitioners-Appellants,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,

Respondents-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENT-APPELLEE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-31a) is reported at 811 F.2d 36 (1st Cir. 1987). The opinion and

judgment of the District Court (Pet. 32a-44a) is reported at 614 F. Supp. 998 (D. Mass. 1985).

STATEMENT OF THE CASE

In August, 1979, over the objection of a neighborhood group known as the Friends of Shawsheen Village Association ("Association"), the building inspector of the Town of Andover, Massachusetts, issued a building permit to the petitioners-appellants, James and George Chongris (Chongrises), to convert a building to a Dunkin Donuts franchise. Pet. 4a, 33a-34a.

On or about August 30, 1979, the Association filed with the Town a letter, seeking, pursuant to Mass. G.L. c. 40A, §§ 8 and 15, to appeal the building inspector's granting of the building per-

mit. Pet. 5a, 14a, 34a. Thereafter, the Association filed a formal petition with the Town of Andover zoning board of appeals ("zoning board") pursuant to Mass. G.L. c. 40A, § 8, for review of the building inspector's granting of the building permit. Id. Their petition rested on four specified grounds. Id.

Notice of a public hearing to be held on their petition on November 1, 1979, was given by publication and by mail. Pet. 5a, 13a-15a, 34a. The Chongrises received such notice. Id. The notice recited, among other things, the date, place, and time of the hearing, and the grounds for the petition. Id.

The November 1, 1979 public hearing before the zoning board was attended by various persons, including James Chongris and the Chongrises' attorney,

both of whom spoke at the hearing. Pet. 5a, 34a, 52a-57a.

The zoning board voted unanimously on November 13, 1979, to reverse the building inspector's decision and issued a written decision ordering him to revoke the building permit. Pet. 5a, 34a, 52a-57a.

Thereafter, the Chongrises filed, pursuant to Mass. G.L. c. 40A, § 17, an action in state Superior Court seeking judicial review of the zoning board's decision. Pet. 5a-6a, 34a-35a, 45a-49a, 51a. On December 29, 1982, the Superior Court annulled the zoning board's decision on the ground that the zoning board lacked jurisdiction because the Association had no standing to appeal the building inspector's decision. Pet. 35a, 51a.

The zoning board and the Association appealed from the judgment and the Chongrises cross-appealed. Pet. 9a, 35a, 45a-49a. The state Appeals Court affirmed the Superior Court judgment on February 15, 1984. Pet. 9a, 45a-49a; Chongris v. Board of Appeals, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (1984).[1/]

In the meantime, in 1980 the Chongrises filed the present civil rights action in District Court pursuant to 42 U.S.C. § 1983 (Pet. 7a), against the zoning board and its members and the Town seeking, among other things, compensatory damages for the revocation of

---

1/ The Appeals Court also entered an order awarding the Chongrises double costs and an attorney's fee of $1,000 in connection with the appeal, Pet. 9a, 50a, which the Association paid to the Chongrises.

their building permit. In March, 1985, they filed a second amended complaint which, among other things, placed in issue the facial constitutionality of sections of the Massachusetts zoning statute. Pet. 10a, 25a-28a. In particular, they alleged that the post-deprivation remedy under Mass. G.L. c. 40A, § 17, of which they successfully availed themselves in state court is an inadequate state law remedy which violates the due process clause because it does not provide for compensatory damages in any case, or for costs in cases of non-negligent, good faith error. Pet. 26a.

As to the pre-revocation notice and hearing provisions of the zoning statute, the petitioners' complaint was a confusing mixture of a constitutional attack on the statute on its face and as ap-

plied. Pet. 25a-26a, 11a-12a. They alleged that Mass. G.L. c. 40A, § 11 (second paragraph), violates the due process clause because it does not provide adequate notice of contemplated or possible adverse zoning board action to a property-owner whose building permit is the subject of an appeal. Id. They further alleged that Mass. G.L. c. 40A, § 15, violates the due process clause because it fails to specify the rights to be afforded applicants or property owners at hearings before zoning boards of appeals and does not provide the rights to testify, to present evidence and argument, to call and cross-examine witnesses, to be represented by counsel, to answer and refute allegations, arguments, claims and evidence of adverse witnesses, and to defend and explain one's entitlement to a permit. Id.

In light of the petitioners' challenge to the facial validity of Mass. G.L. c. 40A, the Attorney General of the Commonwealth of Massachusetts intervened. See Mass. G.L. c. 231A, § 8. Pet. 9a.

On July 30, 1985, the District Court allowed the defendants' motion to dismiss on grounds of res judicata. Pet. 9a, 32a-44a. The Chongrises appealed, and on February 12, 1987, the Court of Appeals affirmed the judgment but on a different ground than that relied on by the District Court; the Court of Appeals decided that the petitioners had failed to state a claim for relief under federal law. Pet. 1a-31a and n. 1.

REASONS FOR DENYING THE WRIT

The petitioners persist in their attempt to fashion their situation into a

constitutional case of paramount importance when, in reality, it is a run of the mill dispute between a developer and a local zoning board over the revocation of a building permit. Such disputes are common fare of the Massachusetts courts; indeed, since 1979 when the controversy here started, the Massachusetts appellate courts alone have entertained some ninety-three cases involving zoning appeals under Mass. G.L. c. 40A, § 17.[2/] The petitioners offer no substantial reason why that body of litigation should be federalized. As the Court of Appeals aptly stated: "Although the second amended complaint is a massive document . . . a linguistic avalanche cannot serve to make out a constitutional claim where none exists . . . . No matter how assiduously Aladdin's Lamp is rubbed, the ge-

nie of federal jurisdiction does not appear . . . ." Pet. 30a.

The Court of Appeals decision is consistent with numerous precedents of that Court over the past several years involving zoning (or licensing) disputes (in two of which a writ of certiorari was sought and denied),[3/] and with this Court's decisions in Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984). The petitioners do not suggest that the decision is inconsistent or in conflict with decisions of other circuits. Furthermore,

---

2/ This is based on a Lexis search done on June 2, 1987 by undersigned counsel using the search "40A w/10 17 and date aft 1/1/79." It is not possible to determine in any easy manner the number of such cases filed in state Superior Court during that period.

the decision is correct. Petitioners' last minute recharacterization in this Court of their case as a "takings" case under the Just Compensation clause (Pet. 9-10) should not be considered and, in any event, is misguided. For all of these reasons, the petition for a writ of certiorari should be denied.

A. The Statute Provides An "Adequate" And "Meaningful" State Law Remedy.

The Chongrises admit that Massachusetts law provided a procedure in state court to annul the decision of the zoning board and to restore to them their build-

---

3/ See Raskiewicz v. The Town of New Boston, 754 F.2d 38 (1st Cir.), cert. denied, 106 S. Ct. 135 (1985); Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982).

ing permit. Pet. 26a. Nevertheless, they claim that neither the procedures of Chapter 40A or Chapter 231A (the state Declaratory Judgment Act) of the Massachusetts General Laws provides them with due process because neither provides full monetary compensation for losses they suffered as a result of the zoning board's good-faith revocation of the building permit.[4/]

4/ The zoning board members are immune from costs under Mass. G.L. c. 40A, § 17, unless the board acts with "gross negligence, in bad faith, or with malice." They are likewise immune from damages under Massachusetts common law. See, e.g., Gildea v. Ellershaw, 363 Mass. 80, 298 N.E.2d 847 (1973); Ramos v. Board of Selectmen of Nantucket, 16 Mass. App. Ct. 308, 450 N.E.2d 1125 (1984). The Town of Andover is also immune. Pet. 11, 10a, 26a.

To be adequate under the due process clause, a state law remedy need not provide a plaintiff with all of the relief or the same relief which might be available to him under 42 U.S.C. § 1983. See Hudson v. Palmer, 468 U.S. 517, 535-36 (1984); Parratt v. Taylor, 451 U.S. 527, 543-44 (1981). In Hudson, this Court reiterated its holding in Parratt, supra, that deprivation of property does not violate the due process clause if the state "makes available a meaningful post deprivation remedy," Hudson, 468 U.S. at 533 (emphasis added), and that the fact that one might not be able to recover through state law remedies "the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." Hudson, supra, 468 U.S. at 535. The inevitable

costs of regulatory error in a highly regulated society may include delay, litigation expenses, and revenue losses. But these are ordinary costs which do not implicate the Constitution. E.g., Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 204-05 (Stevens, J., concurring); Roy v. City of Augusta, Maine, 712 F.2d 1517, 1523 (1st Cir. 1983). In Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), this Court reaffirmed the "American Rule" that each side in litigation bears its own attorney's fees unless there is "bad faith" or a statute that provides the losing party must pay the winning party's fees. To suggest, therefore, that the Due Process clause is violated in this case because the Chongrises cannot recover, inter alia, their attorney's fees

(Pet. 11-13) is to suggest that the "American Rule" itself is unconstitutional. Surely, that is not the case.

The decision in this case is also consistent with numerous decisions of the Court of Appeals for the First Circuit finding statutory remedies in zoning and business regulation cases to be "adequate" and "meaningful" under the Due Process clause. Compare Alton Land Trust v. Town of Alton, 745 F.2d 730 (1st Cir. 1984), Quinn v. Bryson, 739 F.2d 8, 9 (1st Cir. 1984), Cloutier v. The Town of Epping, 714 F.2d 1184, 1189 (1st Cir. 1983), Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983), and Clark v. Bissonnette, 604 F. Supp. 710, 713 (D. Mass. 1985) (state review procedures satisfy due process despite delay and extra costs) with Roy

v. City of Augusta, Maine, 712 F.2d 1517, 1523 (1st Cir. 1983) (where plaintiff lost the premises due to foreclosure as a result of local board flouting the mandate of the state supreme court, and state court could not award money damages therefor, state court's granting of a license was not an "adequate" remedy).[5/]

Like the aggrieved plaintiffs in Alton, Cloutier, Quinn, Chiplin, and Clark, supra, the Chongrises had a state procedure to follow, they followed it, they ultimately prevailed, and they still own the land and can benefit from the building permit. Also like the plaintiffs in

---

5/ Cf. Limerick v. Greenwald, 749 F.2d 97, 99 (1st Cir. 1984) and Roslindale Cooperative Bank v. Greenwald, 638 F.2d 258, 260 (1st Cir.), cert. denied, 454 U.S. 831 (1981) (plaintiffs' due process claim fails on merits because there was a process available under state law for review of removal and certification decisions by Commissioner of Insurance).

those cases, the Chrongrises suffered delays and extra costs as a result of the defendants' action and pursuit of state judicial remedies. Nevertheless, as recognized in each of those cases, the state procedure was adequate and did not violate the due process clause. Accord Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 831-34 and n. 9 and cases cited (1st Cir.), cert. denied, 459 U.S. 989 (1982).

Were the plaintiffs' theory to prevail, federal courts would be inundated with Section 1983 claims by disappointed and disgruntled -- indeed, even, as here, prevailing -- developers, landowners, and others.[6/] The federal courts would

---

6/ As noted above, since 1979, the Massachusetts appellate courts alone have decided some ninety-three zoning appeals.

(footnote continued)

become super zoning boards of appeals embroiled in local zoning and planning disputes, and state schemes for administrative and judicial review and redress would thereby be circumvented and undermined.

For all these reasons, a writ of certiorari should not be granted.

B. The Pre-Deprivation Notice and Hearing Provided By The Statute Satisfy Procedural Due Process.

The petitioners claim that the notice provision of Chapter 40A, § 11, violates the due process clause because the notice

---

(footnote continued)

Contrary to petitioners' argument (Pet. 17-18), the cases cited at Pet. 17-18 are inapposite -- they involved constitutional attacks on the facial validity of restrictive local zoning ordinances, not appeals from local zoning board decisions.

is not required to recite contemplated or possible adverse zoning board action or relief to one whose permit is the subject of an appeal. Pet. 13-14, 13a-16a. They also claim, in essence, that the public hearing afforded under Chapter 40A, § 15, of the Massachusetts General Laws, prior to revocation of a permit, does not comport with the due process clause because it is not a full evidentiary hearing. Pet. 14-16, 16a-18a.

The petitioners' claims are unfounded. More importantly, the petitioners have not alleged any practical harm that occurred as a result of the allegedly deficient notice or hearing. They were able to convince the Superior Court to reverse the zoning board's deci-

sion, and to persuade the Appeals Court to affirm that court's decision. Moreover, the requirements of notice and a hearing go particularly to determining factual issues. In this case, the zoning board's error was one of law -- it acted ultra vires. Thus, it is especially difficult to see what difference a different notice or hearing would have made here.

As this Court has often said "an essential principle of [due] process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'." Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1495 (1985), quoting from Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added).

See also Atkins v. Parker, 105 S.Ct. 2520 (1985). Even where due process requires a pre-deprivation hearing, the hearing need not be elaborate. Rather, [t]he "formality and procedural requisites of the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Cleveland Board of Education, supra, 105 S. Ct. at 1995, quoting from, Boddie v. Connecticut, 401 U.S. 371, 378 (1971). "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." Id., quoting from Mathews v. Eldridge, 424 U.S. 319, 343 (1976).7/

7/ As the Cleveland Court recognized, there has been only one case (Goldberg v. Kelly, 397 U.S. 254 (1970)), where the Court has required a full adversarial evidentiary hearing prior to the deprivation of a property interest. Cleveland, supra, 105 S. Ct. at 1495.

Here, the notice (which was published and mailed) stated the time, date, and place of the public hearing, the petitioner's name (i.e. the Association), the location of the subject premises, and the nature of the action, namely, an appeal from the grant of the building permit. Moreover, the Chongrises had a right to see the Association's petition that was on file with the Town.[8/] They admit that they received the notice and were represented by counsel. From the notice, from the Association's petition,

---

8/ Under Chapter 40A, § 15, appeals from decisions of building inspectors must specify the grounds therefor. See DiGiovanni v. Board of Appeals of Rockport, 19 Mass. App. Ct. 339, 344, 474 N.E.2d 198, review denied, 394 Mass. 1103, 477 N.E.2d 595 (1985).

and from the applicable statutes,[9] the Chongrises should have known that revocation of the permit was one avenue the zoning board could take on an appeal from a grant of a building permit. Indeed, the Court of Appeals concluded that "the appellants' belated claim that they were 'surprised' by the revocation is plainly disingenuous." Pet. 15a.

Chapter 40A, § 15, provides for a "public hearing" at which the board chairman "may administer oaths, summon witnesses, and call for the production of papers." The statute contemplates that one will be permitted to present

---

9/ The Chongrises are deemed to have notice of the provisions of Chapter 40A, Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304, 313, 496 N.E.2d 646 (1986), including Section 14 that delineates a zoning board's powers in such a case.

evidence and argument, to have counsel present, and to ask and answer questions, all of which the Chongrises did in this case, and it provides for a written record of the hearing, a written decision with a recorded vote and a statement of reasons, all of which was done here. Depending on the circumstances, even formal cross-examination of witnesses may be permitted.[10/] The type of hearing contemplated by Section 15 satisfies the minimal requirements of procedural due process, especially in light of the post-hearing avenue for judicial review provided by Section 17. E.g., Cloutier v. Town of Epping, 714 F.2d 1184, 1191 (1st

---

10/ In this case, there is nothing in the record to indicate that the petitioners ever sought to cross-examine any witness or asked the zoning board for permission to do so. Pet. 18a n.6.

Cir. 1983)(full judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits).

For these reasons, so much of the petitioners' second amended complaint as challenges the facial validity of Chapter 40A, §§ 11 and 15, fails to state a federal claim upon which relief can be granted and was properly dismissed.

C. This Case Does Not Involve A Taking Of Private Property For A Public Use.

Surprisingly, the petitioners assert for the first time in this Court that "This case presents the Court with the opportunity to definitively decide the due process question that has evaded

review in the taxings (sic)[11/] context . . . ." Pet. 9. This is surprising not only because this issue was not raised below, but also because this case simply does not involve a "taking" of private property for a public use. All of the cases cited by the petitioners (Pet. 9-10) are inapposite because they involve whether a local ordinance (zoning or otherwise) which regulates in a general way the types of uses a person may make of his property constitutes a regulatory taking (i.e. inverse condemnation) of private property for a public purpose under the Fifth and Fourteenth Amendments for which one is entitled to just compensation. For these reasons, the peti-

---

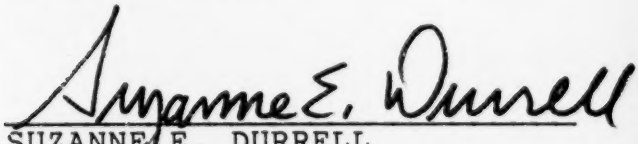
11/ The Attorney General assumes the petitioners meant to say the "takings context."

tioners' argument does not provide a basis for granting of writ of certiorari.

CONCLUSION

For the reasons discussed herein, the Attorney General respectfully requests that the petition for a writ of certiorari be denied.

JAMES M. SHANNON
ATTORNEY GENERAL
Commonwealth of
Massachusetts



SUZANNE E. DURRELL
Counsel of Record
Assistant Attorney General
One Ashburton Place,
Room 2019
Boston, MA 02108
(617) 727-1010

Dated: June 5, 1987